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CASE NO. 82-5466

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT AND APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourth amendment as applicable to the states by virtue of the fourteenth amendment, which is quoted in the petition for writ of certiorari.

Section 345.22, Wis. Stats. (1977), which provides:

> **Authority to arrest without a warrant.** A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

STATEMENT OF THE CASE

The respondent provides a statement of the case to summarize the developments of this case as it progressed through the state courts and to show that in the state courts the petitioner failed to raise the issue he has presented for review in this court.

The police made a warrantless arrest of the petitioner in his home for the offense of operating a motor vehicle while under the influence of an intoxicant. State v. Welsh, 108 Wis. 2d 319, 321, 321 N.W.2d 245 (1982); R-Ap. 103. The petitioner was charged with the misdemeanor offense of operating a motor vehicle while under the influence of an intoxicant. Upon

conviction, he faced a possible jail sentence of not less than five days nor more than one year and an additional fine of not more than $500.00. R-Ap. 150.

Because the petitioner refused to submit to a breathalyzer test after his arrest, a hearing was scheduled to determine whether the refusal was reasonable. Welsh, 108 Wis. 2d at 320, 322; R-Ap. 102, 104. At the reasonableness hearing, the petitioner claimed that his arrest was illegal. Deciding the issue in the context of the criminal charge, the Circuit Court for Dane County found that the arrest was legal because the police officer had probable cause to believe that the petitioner had committed the offense and exigent circumstances existed to justify the warrantless entry into the home.

The petitioner appealed to the Wisconsin Court of Appeals where both parties treated the case as one involving an arrest for a misdemeanor charge of operating a motor vehicle while intoxicated. In his brief in the Wisconsin Court of Appeals, the petitioner stated that he had been criminally charged. Wisconsin Court of Appeals brief of defendant-appellant, at 2; R-Ap. 235. As to the validity of the arrest, the petitioner argued that because the police did not possess probable cause and because no exigent circumstances existed, the arrest was invalid. Wisconsin Court of Appeals brief of defendant-appellant, at 6-8; R-Ap. 239-41. The petitioner contended that because the arrest was illegal, the trial court lacked personal jurisdiction. Wisconsin Court of Appeals brief of defendant-appellant, at 9; R-Ap. 242.

The State of Wisconsin argued in the Wisconsin Court of Appeals that the arrest was valid on the ground that the police officers possessed probable cause and exigent circumstances existed because, without an immediate arrest, evidence could have been lost or destroyed. Wisconsin Court of Appeals brief of plaintiff-respondent, at 4-7; R-Ap. 266-69.

In his reply brief, the petitioner again indicated that he had been charged with a misdemeanor and he argued that the circumstances were not exigent enough to justify the warrantless entry. Wisconsin Court of Appeals reply brief of defendant-appellant, at 3; R-Ap. 275.

In deciding the appeal in favor of the petitioner, the Wisconsin Court of Appeals treated the case as involving a misdemeanor arrest. Wisconsin v. Welsh, No. 80-1686 (Wis. Ct. App., May 26, 1981), at 5; R-Ap. 145.

The Wisconsin Supreme Court granted the state's petition to review the decision of the court of appeals. In the Wisconsin Supreme Court the state argued that the misdemeanor arrest was valid because it was based on the combination of probable cause and exigent circumstances. Wisconsin Supreme Court brief of plaintiff-respondent-petitioner; R-Ap. 170-89.

In his responding brief in the Wisconsin Supreme Court, the petitioner argued that the police did not have probable cause to believe that a misdemeanor had been committed because there was no showing that at the time of the arrest the police knew whether the petitioner had previously been convicted of operating a motor vehicle while intoxicated. Wisconsin Supreme Court brief of defendant-appellant, at 6; R-Ap. 212. The petitioner argued that, at best, the police only had probable cause to believe that he had committed a first offense for operating while intoxicated, the conviction for which carried a noncriminal forfeiture penalty. Wisconsin Supreme Court brief of defendant-appellant, at 6; R-Ap. 212.

In its reply brief, the State of Wisconsin argued that the petitioner had waived his probable cause argument because he raised it for the first time in his responding brief in that court. In the Wisconsin Court of Appeals the petitioner had not challenged probable cause on the ground that the police, at the time of the arrest, had not known of a prior conviction for operating a motor vehicle while intoxicated. Wisconsin Supreme

Court reply brief of plaintiff-respondent-petitioner, at 2-5; R-Ap. 223-26. On the merits of the probable cause argument, the state contended that even if the police did not know of a prior conviction for operating a motor vehicle while intoxicated, the police had probable cause to believe that the petitioner had committed the civil offense of drunk driving; and sec. 345.22, Wis. Stats. (1977), authorized an arrest for that offense on the basis of probable cause. The state argued that this probable cause plus exigent circumstances justified the entry into the home to make the warrantless arrest. Wisconsin Supreme Court reply brief of plaintiff-respondent-petitioner, at 5-8; R-Ap. 226-29.

The Wisconsin Supreme Court reversed the decision of the court of appeals and affirmed the order of the circuit court in holding that the coexistence of probable cause and exigent circumstances justified the warrantless entry into the home to make the arrest. Welsh, 108 Wis. 2d at 321; R-Ap. 103. The Wisconsin Supreme Court found that the arrest was valid because there was probable cause and because sec. 345.22, Wis. Stats. (1977), authorized the police to make an arrest for violation of a traffic regulation where the officer had probable cause to believe that the traffic regulation had been violated. Welsh, 108 Wis. 2d at 330; R-Ap. 112. The majority of the Wisconsin Supreme Court also found that exigent circumstances were present, and that when they were coupled with the probable cause, the arrest was valid. Welsh, 108 Wis. 2d at 336-39; R-Ap. 118-21.

Nowhere in its opinion did the majority of the Wisconsin Supreme Court discuss whether the requirements for a valid warrantless arrest in the petitioner's home differed depending on whether the arrest was for a felony, a misdemeanor or a civil forfeiture offense. The majority of the supreme court discussed whether there were probable cause and exigent circumstances, which was the way the case was presented to the court by the parties.

In her dissenting opinion in the Wisconsin Supreme Court, Justice Abrahamson doubted the constitutionality of sec. 345.22, Wis. Stats. (1977), as far as authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Welsh, 108 Wis. 2d at 341; R-Ap. 123. In a footnote, Justice Abrahamson pointed out that both the petitioner and the state initially treated this case as if the petitioner had been accused of violating a criminal statute and not a civil statute. The court of appeals' decision stated that the case involved a misdemeanor. In the same footnote, Justice Abrahamson noted that the state argued that the petitioner had waived the issue of whether this was a crime; but Justice Abrahamson would have exercised discretionary powers of the court to review the validity of sec. 345.22, Wis. Stats. (1977). Welsh, 108 Wis. 2d at 342-43 n.1; R-Ap. 124-25. Justice Abrahamson also pointed out that neither the petitioner nor the state had discussed the question of the validity of sec. 345.22, Wis. Stats. (1977). Because the validity of that statute was significant, Justice Abrahamson would have asked the parties for further briefing. Welsh, 108 Wis. 2d at 344; R-Ap. 126.

The petitioner did not file a motion for reconsideration in the Wisconsin Supreme Court.

SUMMARY OF ARGUMENT

The petitioner has requested this court to issue a writ of certiorari to review the question of whether the fourth and fourteenth amendments prohibit police from making a non-consensual warrantless night entry into a person's home to arrest him for a violation of a non-jailable traffic offense committed outside the presence of the officer. The respondent contends that the petitioner never raised that issue in the state courts and that the state courts did not address that issue in their decisions. Because the issue was not raised or decided in the

state courts, this court should not, indeed cannot, hear and decide the issue.

The petitioner also argues that there was not proof of exigent circumstances because the record contains no evidence of how long it would have taken to obtain a warrant. The respondent submits that this issue merely raises a question of the sufficiency of the evidence, which is not an issue normally reviewed by this court. In addition, the petitioner did not raise this issue in the Wisconsin Court of Appeals or the Wisconsin Supreme Court.

ARGUMENT

IN THE STATE COURTS THE PETITIONER DID NOT RAISE THE ISSUES HE HAS PRESENTED FOR REVIEW IN THIS COURT; AND, THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

In the Wisconsin state courts the petitioner never raised the issues he is now presenting to this court. In the state courts he never argued that a warrantless arrest in the home for a non-jailable offense cannot be valid under the fourth and fourteenth amendments. Until he filed his responding brief in the Wisconsin Supreme Court, the petitioner always treated the case as one involving a misdemeanor and only contended that the issues were whether the police possessed probable cause and whether exigent circumstances existed to justify the warrantless arrest. In his responding brief in the Wisconsin Supreme Court, the petitioner argued that the police had no probable cause to believe that a misdemeanor had been committed because there was no showing that the police knew whether the petitioner had a prior conviction for drunk driving. Nevertheless, this argument was framed in the context of a challenge to the probable cause finding; and the petitioner did not contend that the fourth and fourteenth amendments prohibited any warrantless arrest in his home for a non-jailable offense. The petitioner only questioned whether the police possessed probable cause.

The majority of the Wisconsin Supreme Court addressed only the issues raised by the parties, i.e., issues relating to probable cause and exigent circumstances. The Wisconsin Supreme Court applied the methodology recognized by this court in Payton v. New York, 445 U.S. 573 (1980). See Welsh, 108 Wis. 2d at 327; R-Ap. 109. The Wisconsin Supreme Court examined the record to determine whether the warrantless arrest was justified on the grounds that police possessed probable cause and that exigent circumstances existed. The Wisconsin Supreme Court discussed and applied sec. 345.22, Wis. Stats. (1977); but the majority did not discuss the constitutionality of that statute.

In petitioning this court for the writ of certiorari, the petitioner raises issues he did not raise in the state courts. The petitioner wants this court to consider whether a warrantless arrest in the home was invalid because the arrest was for a non-jailable offense. In her dissenting opinion in Welsh, Justice Abrahamson indicated that this issue was not raised or argued by the parties and was not discussed by the majority of the Wisconsin Supreme Court. See Welsh, at 342-43 n.1, and 344, dissenting opinion of Justice Abrahamson; R-Ap. 124-26.[1/]

The failure of the petitioner to raise this issue in the state court briefs is evidence that he did not raise it in the state courts. Amalgamated Food Employee's Union v. Logan Valley Plaza, 391 U.S. 308, 313 n.6 (1968); and Beck v. Washington, 369 U.S. 541, 553 (1962). Because the issue was not raised by the petitioner and because the issue was not decided or discussed by the Wisconsin Court of Appeals or the majority of the Wisconsin Supreme Court, this court cannot review this issue

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[1/] In her dissenting opinion, Justice Abrahamson in footnote 1 of 108 Wis. 2d at 343, stated that there was no indication the offense was criminal. This statement was not accurate because the complaint charged a misdemeanor offense for operating a motor vehicle while intoxicated. See R-Ap. 150. The complaint did not have to allege the petitioner's prior conviction for operating while intoxicated because the prior conviction was not an element of the crime. See State v. McAllister, 107 Wis. 2d 532, 319 N.W.2d 865 (1982).

upon the issuance of a writ of certiorari. Beck, 369 U.S. at 553-54, and Amalgamated Food Employee's Union, 391 U.S. at 313 n.6, and dissenting opinion of Justice Harlan in 391 U.S. at 334-36.

Therefore, the respondent submits that this court should not grant the petition for writ of certiorari to consider whether the fourth and fourteenth amendments prohibit the police from making a nonconsensual warrantless night entry into a person's home to arrest him for violation of a non-jailable traffic offense committed outside the presence of the officer.

The petitioner has also argued that this court should grant the petition for writ of certiorari because the record does not contain sufficient evidence to show that exigent circumstances existed that would justify the warrantless entry into the home. At page 6 of his petition for writ of certiorari, the petitioner contends that the record contains no evidence on how long it would take to obtain a warrant within the City of Madison between 9:00 and 9:30 p.m.

The respondent contends that the Wisconsin Supreme Court properly applied the methodology set forth by this court in Payton, i.e., the Wisconsin Supreme Court examined the record for probable cause and exigent circumstances to justify the warrantless entry into the home, to make the arrest. The majority opinion of the Wisconsin Supreme Court fully demonstrates that that court applied the correct law. The only question raised by the petitioner is whether sufficient evidence was presented to support the legal conclusions.

The respondent submits that the petitioner is merely raising a question of sufficiency of the evidence to support the court's finding of exigent circumstances. Sufficiency of the evidence is not the type of question this court normally reviews on certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925); Southern Power Company v. North Carolina Public Service Commission, 263 U.S. 508, 509 (1924), and Houston Oil Company v.

Goodrich, 245 U.S. 440, 441 (1918). Therefore, the respondent submits that this court should not grant the petition for writ of certiorari to consider this issue.

In addition, in neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court did the petitioner challenge the existence of exigent circumstances on the ground that no evidence was submitted as to the time it would take to obtain the warrant. Therefore, because the issue was not raised in the state courts, it cannot be raised in this court on a writ of certiorari.

CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, requests this court to deny the petition for writ of certiorari.

However, if this court grants the petition for writ of certiorari, the respondent wishes to retain the right to raise the arguments it raised in the Wisconsin state courts in support of the legality of the arrest.

Dated this 6th day of December, 1982.

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STATE of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Edward G. WELSH, Defendant-Appellant.

Supreme Court

No. 80-1686. Argued March 1, 1982.—Decided July 2, 1982.

(Reversing 102 Wis. 2d 727, 308 N.W.2d 772.)

1. Searches and Seizures § 33*—acts without warrant—probable cause.
Evidence was sufficient to establish probable cause to justify warrantless entry of defendant's home, where evidence included testimony of eyewitness that defendant was intoxicated, where defendant left scene of accident and where officer recollected that he had been involved with defendant in recent alcohol related disturbance.

2. Searches and Seizures § 33*—acts without warrant—reliability of informant.
Citizen who purports to be victim of or to have witnessed crime is reliable informant even though his reliability has not heretofore been proved or tested.

3. Automobiles and Other Motor Vehicles § 731*—driving under influence of intoxicants—warrantless search of home—exigent circumstances.
Evidence was sufficient to establish exigent circumstances justifying officer's warrantless entry into defendant's home, where eyewitness at scene of accident informed officer that defendant was intoxicated, defendant had left scene of accident and where officer made prompt attempt to locate defendant in order to prevent him from returning to his, or another automobile, where he could have continued to drive in his condition.

ABRAHAMSON and HEFFERNAN, JJ., dissent.

REVIEW of a decision of the Court of Appeals. *Reversed.*

* See Callaghan's Wisconsin Digest, same topic and section number.

For the plaintiff-petitioner the cause was argued by *Stephen W. Kleinmaier*, assistant attorney general, with whom on the briefs was *Bronson C. La Follette*, attorney general.

For the defendant-appellant there was a brief and oral argument by *Archie E. Simonson* of Madison.

WILLIAM G. CALLOW, J. This is a review of a May 26, 1981, decision of the court of appeals vacating an order of Dane County Circuit Judge Mark A. Frankel and remanding the matter to the circuit court for further proceedings. We reverse the decision of the court of appeals and affirm the order of the circuit court. The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by sec. 343.305(2)(a), Stats. 1977,[1] after having been issued a citation for the operation of a motor vehicle while under the influence of an intoxicant. Section 346.63(1), Stats. 1977.[2]

[1] Section 343.305(2)(a), Stats. 1977 provides that

"Revocation of license on refusal to submit to tests . . . (2)(a) If a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." *Id.*

[2] Section 346.63(1), Stats. 1977, provides that "[n]o person may drive or operate a motor vehicle while under the influence of an intoxicant or a controlled substance."

The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.[3] The circuit court upheld this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. The defendant appealed from this circuit court order, and a single judge of the court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding a consensual entry necessitated remanding the case on that issue. We affirm the findings of the circuit court, holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest and obviates any further discussion concerning the issue of consensual entry.

Prior to resolving the merits of this case, the state challenges the single-judge ruling of the court of appeals, contending that this should have been decided by a three-judge panel. Section 752.31(2), Stats. 1977, provides a

[3] The requirements contained in the Fourth Amendment of the Federal Constitution are binding against the states through the Fourteenth Amendment. Further, the provisions of the Fourth Amendment to the Federal Constitution are identical to those contained in Article I, sec. 11 of the Wisconsin Constitution. Both provide that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV; *see* Wisconsin Constitution, Article I, sec. 11.

categorization of cases subject to review by a single court of appeals judge, as opposed to a three-judge panel.[4] This dispute focuses on whether the defendant's unreasonable refusal to submit to a breathalyzer test pursuant to sec. 343.305(2)(a), Stats. 1977, falls within the purview of sec. 752.31(2)(c), Stats. 1977, authorizing a single-judge appeal in cases involving violations of traffic regulations. The state contends that the statutory penalty imposed for violation of a traffic regulation, as defined in sec. 345.20(1)(a), Stats. 1977, is a forfeiture. According to sec. 288.01, Stats. 1977, however, a forfeiture is defined as "any penalty, in money or goods" and the penalty pursuant to violating sec. 343.305, Stats. 1977 is a suspension of operating privileges. Consequently, the state argues that a suspension is not a forfeiture and therefore is not included within the parameters established in sec. 752.31(2), Stats. 1977. The defendant's timely notice of appeal conferring jurisdiction to the court of appeals vitiates the need to determine whether

[4] Section 752.31(1), (2), (3), Stats. 1977 provides:

"752.31 Disposition of cases. (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of 3 judges to dispose of cases on their merits.

"(2) Appeals to the court of appeals in the following types of cases shall be heard as specified in sub. (3):

"(a) Cases under ch. 299.

"(b) Municipal ordinance violation cases.

"(c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).

"(d) Cases under ch. 51.

"(e) Cases under ch. 48.

"(f) Misdemeanors.

"(3) A case specified under sub. (2) shall be heard by one court of appeals judge, except that any party on appeal may move in writing to the chief judge of the court of appeals that the case be heard by a 3-judge panel. The chief judge may grant or deny the request ex parte. Any appeal which is heard by a single court of appeals judge shall be heard in the county where the case or action originated if any party so requests."

sec. 343.305(2)(a), Stats. 1977, is a traffic regulation. For if the court of appeals in its exercise of jurisdiction erroneously assigns this case to a single judge rather than to a panel, this alleged error, and we need not rule whether the court of appeals erred in this case, was waived when neither the state nor the defendant interposed a timely objection. Although resolving this issue is unnecessary in the present case, it is instructive to note that sec. 752.31(2)(c), Stats., 1979–1980, was recently amended to include license suspension "cases under sec. 343.305," thereby expressly incorporating these cases within the parameters of sec. 752.31(2)(c), authorizing a single judge appeal. See sec. 2, ch. 152, Laws of 1981 (effective March 31, 1982).

The factual sequence underlying this dispute can be summarized through the testimony of the sole witness, Randy Jablonic. On the evening of April 24, 1978, Jablonic, a University of Wisconsin rowing coach, was driving alone in his truck. It was raining. He noticed that the driver of the automobile ahead of him was experiencing difficulty in operating his vehicle. In addition to the automobile's erratic speed, it was moving from side to side, crossing into the opposing lane, barely missing a road sign, a median strip, and the oncoming traffic. The vehicle ultimately left the road entirely and drove into a field where it either became stuck or stalled.

Jablonic, concerned that the car might return to the road and fearful "[b]ecause I realized [he] would probably kill somebody" remained at the scene blocking the car to be certain that the car did not return to the highway. A motorist stopped and Jablonic requested her to alert the police. An officer arrived at the scene shortly thereafter.

Prior to the officer's arrival, however, the driver left the automobile in the field and approached Jablonic's truck. Jablonic testified that the driver asked him for a

ride home but Jablonic replied that they should wait for assistance in removing or repairing the car, rather than leaving it in the field. At this point the driver became alarmed and "broke into a very slurred conversation—'you wouldn't get your cops'—or something it was very insecure and not very controlled conversation." The driver then left Jablonic and headed back across the field abandoning the automobile and departing from the scene of the accident.

The police arrived "practically immediately upon, . . . his departure" and spoke with Jablonic who had remained at the scene. Jablonic responded to the officer's inquiry by describing his observations of the automobile and its driver. Jablonic told the officer that he believed that the driver "was very inebriated or very sick or not very much in possession of his faculties or ability to perform." When asked at trial what formed the basis of his opinion that the defendant was inebriated, he testified ". . . the erratic motion of the car, and then the staggering and slurred speech that [the driver] exhibited when he was trying to talk" constituted the basis upon which he formed his conclusion that the driver was intoxicated. He further described the driver's walk as unsteady and unsure. He stated that when he spoke with the driver at the roadside he had remained in his truck. Consequently, he declared that he had "no opportunity to smell the [driver's] breath." Jablonic further testified that he commonly "see[s] many inebriated people, unfortunately," demonstrating his familiarity with the symptons of intoxication. Although Jablonic stated that "he [the driver] was very inebriated or very sick or not very much in possession of his faculties or ability to perform," this statement, when considered within the context of the entire record, demonstrates the propriety of the trial judge's conclusion that Jablonic conveyed the definite impression that the driver was intoxicated. Jablonic's reference to

illness was merely a remote possibility which provided an alternative, more charitable explanation—illness—to account for his erratic driving, unsteady movements, and slurred speech. The record supports the trial judge's ruling that the officer had probable cause to believe that the driver was intoxicated.

At the scene of the accident the officer ran a license check to determine the vehicle owner's identity. Although the officer could not conclude that the owner of the abandoned automobile was necessarily its driver, he did correctly recall that he was involved in the arrest of the owner in an alcohol-related disturbance within two weeks prior to this accident. The officer's recollection was sufficiently pertinent to provide additional evidence to support the existence of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence which was located near the scene of the accident. Attempting to confirm his belief that the defendant had, in fact, been driving his abandoned vehicle while under the influence of an intoxicant, the officer, arriving at the defendant's residence, asked the defendant's stepdaughter if the defendant was at home. The officer testified that she replied, he had "just stumbled in . . . ." "He is upstairs, and motioned that way—towards the stairs, allowing us to pass." Proceeding up the staircase, the officer encountered the defendant's wife. He testified that she asked:

" 'What is going on,' . . . again, we explained there had been an accident, . . . And we would like to speak with him because *we thought he was probably under the influence of an intoxicant*. And she, at that point, also gave her consent for us to go up, because she said, 'Yes, he is in bed. He just got into bed. And something has to be done,' referring to the fact that she recognized me from the earlier—I assumed she recognized me from the

earlier case, and was, I think, saying that she was concerned about his alcoholic problem. And she indicated, 'Something has to be done,' and motioned us to the bedroom." (Emphasis added).

Affirming the trial court's dual finding of probable cause and exigent circumstances vitiates the need to remand this case to the circuit court on the issue of consensual entry, as was ordered by the court of appeals.

The issue in the present case addresses the delicate interrelationship between the individual's right to privacy and the governmental responsibility to enforce the law in a manner which serves the public interest. To prevail in this case, the state must prove the co-existence of probable cause[8] and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circum-

[8] The arrest in the present case is statutorily authorized in sec. 345.22, Stats. 1977. This statute only requires probable or reasonable cause to effectuate a warrantless arrest.

Section 345.22, Stats. 1977, provides:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

The "reasonable grounds to believe" language in sec. 345.22 is synonomous with the constitutional standard of probable cause. *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Consequently, our reference to probable cause in the present case shall be interpreted as being used interchangeably with and meeting the statutory standard of "reasonable grounds to believe." Section 345.22, Stats. 1977.

Section 345.22 only requires probable cause in its authorization of a warrantless arrest for violation of a traffic regulation. The instant case, however, meets the statutory probable cause standard in addition to meeting the case law requirements of probable cause *coupled with exigent circumstances*.

stances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11. The individual's right to privacy in the home is a fundamental freedom protecting the individual from unreasonable governmental interference; however, this fundamental right is not absolute. It is subject to limited but well-established exceptions where the public interest requires that proper authorities may impinge upon the individual's right to privacy. In these instances of compelling public need, the government bears the burden of proving that the public interest supersedes the individual's right to privacy. Consequently, to insure the validity of a warrentless arrest, the state must prove probable cause, coupled with exigent circumstances. *E.g., Dunaway v. New York*, 442 U.S. 200 (1979); *Henry v. United States*, 361 U.S. 98, 102 (1959); *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971); *see Payton v. New York*, 445 U.S. 573, 575, 583–88 (1980) [citing *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978)].[6]

[6] Both *Payton* and *Laasch* are Fourth Amendment cases, providing fundamental support for our position in the present case. *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Although a cursory reading of *Payton* suggests that it is unconstitutional for police officers, having probable cause, to enter a private residence without a warrant, it is clearly distinguishable from the case at bar because, unlike the present case, *Payton* expressly disavows a finding of exigent circumstances. *Payton* states that,

"[a]lthough it is arguable that the warrantless entry to effect Payton's arrest might have been *justified by exigent circumstances*, none of the New York courts *relied on any such justification*. The [New York court] treated both Payton's and Riddick's cases as involving routine arrests in which *there was ample time to obtain a warrant*, and we will do the same. Accordingly, *we have no occasion to consider the sort of emergency or dangerous situation*,

This dual finding is subject to numerous and diverse interpretations. The common feature underlying all search and seizure interpretations, however, is the *reasonableness* of the government's intrusion when considered within the context of the totality of the circumstances. *See: State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The United States Supreme Court has addressed the concepts suggestive of analysis in determining the reasonableness of the governmental interference with the individual's Fourth Amendment rights. "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50–51 (1979). Moreover "'[w]hether an inquiry is considered reasonable must depend upon the facts in each case and must turn on the application of what is essentially an indeterminate and flexible test.'" *Bies v. State*, 76 Wis. 2d at 466 [quoting

described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583 (footnote omitted) (emphasis added).

Likewise, the defendant's warrantless arrest in *Lausch v. State* occurred absent a showing of exigent circumstances. In *Lausch*, the issue before this Court was "whether, in the *absence of any exigent circumstances*, a police officer may enter a suspect's home without consent in order to make a warrantless arrest." 84 Wis. 2d at 593 (emphasis added). Admittedly of less significance than the absence of exigency, the arresting officers in *Lausch* were arguably afforded ample time to obtain a warrant, as there was a thirteen-day interval between the defendant's offense and her arrest. *Id.* at 588–89.

Consequently, the time lapse and the absence of exigent circumstances in both *Payton* and *Lausch* limit their applicability to the present case. In this case, we hold that the existence of exigent circumstances contributes to our justification of Welsh's arrest.

Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175 (1964)]. Although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere balancing test, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis. Exigent circumstances and particularly probable cause, are not susceptible to stringently mechanical definitions. Frequently, case law has offered guidance through example rather than by definition. Consequently, the particularities and peculiarities of a given case are considered in the context of reasonableness. Accordingly, thorough analysis seeks to ascertain whether the case, in its entirety, while meeting the dual standards of probable cause and exigency, veritably accommodates this context of reasonableness.

I. *PROBABLE CAUSE*

The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Paszek*, 50 Wis. 2d at 624–25. In *State v. Paszek*, 50 Wis. 2d at 624–25, we described probable cause as follows:

"Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the

information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is defined in *Draper v. United States*, *supra*, p. 313, as:

"'"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132."'" *State v. Paszek*, 50 Wis. 2d at 624–25 (citations omitted).

To effectuate a warrantless, nonconsensual entry into the residence, in addition to exigent circumstances the officers had to have probable cause to believe that the defendant had committed the offense of driving while under the influence of an intoxicant at the time they entered the home.

[1]

Examination of the record demonstrates the existence of probable cause, satisfying the first requisite of the two-pronged test necessary to justify the officer's warrantless entry and arrest of the defendant. In this case, the officer had a substantial amount of reliable information, indicating to a reasonable police officer that the defendant had probably violated the statute prohibiting driving while under the influence of an intoxicant. *See* secs. 345.22; 346.63(1), Stats. 1977.

[2]

Arriving at the scene of the accident the officer was met by Jablonic, the sole witness to the driver's conduct.

There is nothing in the record which challenges the reliability of either his observations or his statements to the officer. Adhering to the standard for reliability established in *State v. Cheers*, we held

" ' "that a valid arrest without a warrant may be made solely by reason of information communicated by a reliable informant. . . . A *citizen who* purports to be a victim of or to have *witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.* . . . The rationale underlying this principle is that such a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police." ' " 102 Wis. 2d at 395–96. (emphasis added) (emphasis in original omitted) [quoting *State v. Paszek*, 50 Wis. 2d at 631].

Consequently, Jablonic's information satisfies both prongs of the *Cheers* test for reliability.

In the *Cheers* case we discussed an additional " 'factor to be considered in determining whether probable cause exists,' " namely, that the defendant's "conduct and retreat or 'flight' from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt." *State v. Cheers*, 102 Wis. 2d at 391. The defendant's statements, as well as his immediate retreat from the scene in fleeing to his home at the mention of police officers, clearly "constitutes evidence of consciousness of guilt" and is an additional factor buttressing our conclusion that the trial court properly found the existence of probable cause.

Jablonic told the officer at the scene of the accident that the officer had arrived "practically immediately upon [the driver's] departure." The officer's license check identified the owner of the vehicle. As we have noted, ownership does not necessarily indicate the driver's identity; however, the officer correctly recalled his involvement in the recent arrest of the owner in an al-

cohol-related dispute. Jablonic did not give a detailed description to the officer of the driver's physical features, but he did state that the driver was a man wearing wet clothing. This information, coupled with Jablonic's observations of the defendant's erratic driving patterns and his personal conduct, further supports the trial court's holding of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence and was told that the defendant "had just stumbled in." While the officer, prior to his arrival at the house, had probable cause to believe that the defendant was the driver of the abandoned automobile, the defendant's stepdaughter's statement provided additional evidence in support of the proposition that the defendant was the driver because she said he had stumbled in only moments before the officer had arrived.

The word "stumbled" buttressed the witness's belief that the defendant was intoxicated. The fact that the defendant had just returned home on this rainy night supports the officer's belief that the defendant was the driver of his just abandoned car. The officer believed that he had probable cause, declaring that he "thought [the driver] was probably under the influence of an intoxicant."

Although the defendant contends that the officer proceeded to the residence to determine whether he had sufficient evidence to establish probable cause to enter and arrest the defendant, we do not find this contention persuasive. The officer, acting upon Jablonic's observations, coupled with his own accurate recollection of his involvement in the arrest of the defendant in a recent alcohol-related disturbance, had probable cause when he proceeded to the residence. The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause.

Scrutiny of the record, in its entirety, indicates that the officer had probable cause before he entered the defendant's residence. Although the officer may not have been absolutely certain that the defendant was driving while under the influence of an intoxicant, absolute certainty is not the standard employed in determining the existence of probable cause.

The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause. The officer testified that,

". . . it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

The defendant argues that this statement demonstrates that the officer did not believe he had probable cause and was going to the defendant's bedroom solely to investigate. The officer's statement, when considered along with his declaration that the defendant "was probably under the influence of an intoxicant," demonstrates that the investigating statement is not being read by the defendant in the context of the entire record. The officer, correctly believing that he had probable cause, merely recognized that he was not absolutely positive that the defendant had been operating his automobile while under the influence of an intoxicant. The defendant could have been drinking after he returned to his home, thereby rendering the results of a blood alcohol test meaningless. Moreover, if the defendant had been ill, rather than intoxicated, the officer would have changed his original conclusion on which he had predicated the existence of probable cause. Consequently, the officer's statement merely acknowledged that he was not absolutely certain

that the defendant was driving while under the influence of an intoxicant, and prior to arresting the defendant, he was willing to reconsider his initial conclusion if necessary. A synthesis of these facts negates the possibility that the officer only had a mere suspicion that the defendant was driving while under the influence of an intoxicant in violation of sec. 346.63(1), Stats. 1977.

The foregoing evidence, when myopically parsed, may not individually support a finding of probable cause. When examined collectively, however, it unquestionably indicates "that quantum of evidence which would lead a reasonable police officer to believe that the defendant [driver] probably [violated the statute prohibiting driving while under the influence of an intoxicant]."[7] *State v. Cheers*, 102 Wis. 2d at 386; *see Henry v. United States*, *supra*; secs. 345.22 and 346.63(1), Stats. 1977. The evidence in this case clearly demonstrates that the trial court was correct in ruling that the state had met its burden.

In considering the governmental interest, it is appropriate to note that driving under the influence is a pervasive problem of substantial proportion. In Wisconsin in 1981, there was a 5 percent increase in drunken driving convictions from 1980.[8] Further, approximately 50 per-

[7] Consequently, *Welsh* meets the probable cause standard articulated in both the majority and dissenting opinions in *State v. Cheers*, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981); *Id.* at 406, 408 (Abrahamson, J., dissenting).

[8] Wisconsin Department of Transportation figures show that in 1981 there were 32,506 convictions for drunken driving. Drunken driving statistics covering years prior to 1981 have been published in annual reports entitled, Anderson, *Wisconsin Accident Facts* (prepared by the Traffic Accident Data Section of the Division of Motor Vehicles, Department of Transportation [hereinafter *Wisconsin Accident Facts*]).

In Wisconsin in 1980, there were 30,409 convictions for drunken driving. *Wisconsin Accident Facts* 16–17 (1980).

cent of all drivers killed in Wisconsin were driving while legally intoxicated.[9] The increasing number of fatalities caused by drunken drivers has aroused state legislatures to adopt stricter penalties in the forms of substantial fines, imprisonment, and license suspensions to punish those who violate the laws prohibiting driving while under the influence of an intoxicant.[10]

[9] In 1980, 583 drivers were killed. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol content of .10 percent. *Wisconsin Accident Facts* 1 (1981). Similarly in 1978, 576 drivers were killed; while 226 of the 448 tested were found to be legally intoxicated. *Wisconsin Accident Facts* 1 (1979).

[10] Sec. 967.055, Stats., created by Chapter 20, Laws of 1981, provides:

"Sec. 967.055 Dismissing or amending charges; operating a motor vehicle, intoxicant or controlled substance. (1) INTENT. The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, or a controlled substance or both.

"(2) DISMISSING OR AMENDING CHARGE. Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25 or s. 940.09 where the offense involved the use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant or both."

See Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 9 (April, 1982); *e.g.*, sec. 346.63(1), Stats., repealed and recreated by Chapter 20, Laws of 1981; sec. 346.65(2), Stats., repealed and recreated by Chapter 20, Laws of 1981; *see also* Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 15, 17 (May, 1982).

II. *EXIGENT CIRCUMSTANCES*

[3]

In addition to the existence of probable cause, accompanying proof of exigent circumstances must be shown in order to justify this warrantless entry. Proof of exigency vitiates the need for a warrant under those circumstances when obtaining a warrant could frustrate the arrest. An analysis of the facts demonstrates that, in this case, exigent circumstances justified this officer's warrantless entry to effect the arrest of the defendant.

Frequently, proof that the officer is in hot pursuit of the suspect constitutes exigency. The hot pursuit doctrine evolved to encompass situations where time was of the essence. In other words, when requiring the police to obtain a warrant would constitute undue delay, the hot pursuit doctrine is applicable. In this case, time was of the essence. The inherent nature of the offense demanded the suspect's immediate apprehension to accommodate the dictates of the blood alcohol test statute. Section 343.305(2)(a), Stats. 1977. In order for the officer to enforce the statutory requisites, the situation demanded his immediate search for and pursuit of the suspect.

The defendant, fearful of the officer's impending arrival and perhaps recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned. Fleeing to his home, in an attempt to avoid a confrontation with the officer, the defendant's hasty departure resulted in the abandonment of his car. If the officer had retreated and sought to obtain a warrant, rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated.

The imminent threat to safety doctrine also constitutes exigent circumstances. The sole purpose of the blood al-

cohol test is to facilitate prosecution of those driving while under the influence of an intoxicant. *See* sec. 343.305(2)(a) and 346.63(1), Stats. 1977. Further, sec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant "may not be released until four hours have elapsed."[1] This severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

The officer concluded that he had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Accordingly, the situation demanded the officer's prompt attempt to locate the defendant. An arrest would prevent the driver from returning to his, or another automobile, where he could have continued to drive in his current state, posing a danger to himself and the public. Consequently, the nature of this offense, coupled with the po-

[1] Section 345.24, Stats. 1977, provides in its entirety:

"345.24 **Officer's action after arrest for driving under influence of intoxicant.** A person arrested under s. 346.63 or an ordinance in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is .05% or less by weight of alcohol in the person's blood, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest."

tential threat to the public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine.

An equally persuasive argument is the probable destruction of evidence. This is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation. "Sometimes the nature of the evidence will be such that it will soon disappear of its own accord." 2 W. LaFave, *Search and Seizure*, sec. 6.5 at 448 (1978). "Blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." *State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation of sec. 346.63(1), Stats. 1977, would be destroyed. *See* sec. 343.305(2)(a), Stats. 1977. Accordingly, the facts of this case adhere to the presumption favoring warrantless arrests which are a result "of an ongoing investigation in the field," rather than an arrest that had been planned. W. LaFave, *supra*, sec. 6.1 at 391.[13]

[13] Professor LaFave, a preeminent authority on the Fourth Amendment, distinguished a finding of exigency in cases involving p' ned arrests as opposed to those relating to an ongoing investigation in the field:

"A 'planned' arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into custody. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." W. LaFave, *supra*, sec. 6.1 at 391.

"On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or

In summary, we conclude that this situation did not afford the officer ample time in which to obtain a warrant. Further, the record demonstrates that the officer's conduct was reasonable within the context of the surrounding circumstances. Accordingly, we affirm the circuit court's holding, finding the existence of both probable cause and exigent circumstances in the present case.

By the Court.—The decision of the court of appeals is reversed.

CECI, J., took no part.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). As a result of the decision in this case, if a witness reports to the police that:

(1) a few moments ago, on this dark, rainy night he saw a car being driven erratically into a field;

(2) he observed and spoke with the driver of the car but does not know the name of the driver;

(3) the driver staggered and had slurred speech but that the witness had no opportunity to smell any alcohol on the driver's breath;

(4) the driver was either very inebriated or very sick; and

(5) there was no damage to any person or any property;

then the police officers, relying on a statute allowing an officer to arrest a person without a warrant for violating a civil traffic regulation (a civil, not a criminal offense)

ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, *the presumption should be in favor of a warrantless arrest rather than against it*, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it." *Id.* at 392 (emphasis added) (footnote omitted).

committed outside his presence, after checking to find that the title to the car is in your name, may, without your consent and without having a search warrant or arrest warrant issued by a judicial officer:

(1) go to your home at night;

(2) enter your home;

(3) climb the stairs to your second-floor bedroom;

(4) look around your bedroom to see if the clothes you took off match the description of the clothes worn by the driver of the car; and

(5) ask you, as you lie naked in your bed, to get out of bed so that the officers can determine whether you are intoxicated.

I dissent because I conclude that this warrantless invasion into your privacy in your home to investigate whether you violated a civil traffic statute contravenes sec. 11, Art. I, of the Wisconsin constitution and the fourth amendment to the federal constitution which guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ."

The essence of the fourth amendment is that a judicial officer with the power to issue a warrant, not a policeman or government agent, decides whether the government can enter your home without your consent. As Justice Jackson so eloquently stated:

"Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

In a free society a warrant provides fourth amendment protection (1) by substituting the judgment of a judicial officer for that of the police officer; (2) by preventing hindsight from coloring the determination of probable cause; and (3) by providing the person subject to the arrest with assurance that the police officer is acting within lawful authority. *United States v. Martinez-Fuerte*, 428 U.S. 543, 565–66 (1976). Under our constitution a warrantless arrest is unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. *Jones v. United States*, 357 U.S. 493, 499 (1958).

In our country a warrantless entry into a home by a police officer is presumed unreasonable, because our society recognizes the special sanctity of the home. In *Payton v. New York*, 445 U.S. 573, 585–86 (1980), the United States Supreme Court clearly proclaimed that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" and that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." It is only when "exigencies of the situation . . . make warrantless entry *imperative*" that warrantless entry into a person's home may be condoned. *Laasch v. State*, 84 Wis. 2d 587, 594, 267 N.W.2d 278 (1978). (Emphasis added.)

I dissent because I conclude that the warrantless intrusion into the defendant's home in the instant case is unconstitutional. First, I have grave doubts as to the constitutionality of sec. 345.22, Stats. 1977, authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Absent sec. 345.22 the officer has no statutory or common law authority to arrest the defendant without a warrant. Second, assuming arguendo that a police officer has authority to arrest the defendant without a warrant for vio-

lation of a civil traffic offense committed outside the officer's presence if the officer had reasonable grounds to believe that the person violated a traffic regulation, the facts in this record do not support the majority's conclusion that the officer had probable cause to believe that the defendant committed the civil offense of operating a motor vehicle while intoxicated. Third, the facts do not justify the legal conclusion that the circumstances were exigent, making the warrantless entry into the defendant's home "imperative." *Laasch v. State*, *supra*, 84 Wis. 2d at 594.

Arrest for a Civil Offense. In contrast to the cases cited and relied upon by the majority to justify a warrantless entry into the defendant's home, this case does not involve a warrantless arrest for a felony. This case does not involve a warrantless arrest for a misdemeanor. This case does not even involve a warrantless arrest for the violation of a civil traffic statute committed in the presence of an officer. This case involves a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer.

The majority states that the officer's power to arrest is predicated on sec. 345.22, Stats. 1977, which states:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[1]

[1] Both the defendant and the state initially treated this case as if the defendant was accused of violating a criminal statute and not a civil statute. The court of appeals decision stated that the case involved a misdemeanor yet there is no proof in the record that the defendant was involved in a crime. A first violation of sec. 346.63(1) is a civil forfeiture; a second or subsequent violation of within the statutory time period is a crime. Sec. 346.65(2)(a)1, 2. The state in its briefs referred to the officer's power to arrest under sec. 968.07(1)(d), Stats. 1979–80, the criminal arrest statute.

Sec. 345.22 is a departure from the common law doctrine of arrest and for the long-standing rules of arrest in Wisconsin. The statute was enacted in 1971. The long-standing Wisconsin rules of arrest allowed an officer to make a warrantless arrest if the officer had probable cause to believe the person had committed a felony or to believe the person committed a misdemeanor in the officer's presence. The officer could not make a warrantless arrest if the misdemeanor was not committed in the officer's presence. The common law, in contrast to the Wisconsin law, was more restrictive as to the officer's power to make a warrantless arrest for a misdemeanor. At common law the arrest was permissible only if the misdemeanor was committed in the presence of the officer and constituted a breach of the peace. *State v. Smith*, 50 Wis. 2d 460, 469, 472, 184 N.W.2d 889 (1971).

The validity of sec. 345.22, which authorizes a warrantless arrest for violation of a civil statute when the violation was committed outside the presence of the officer cannot be assumed. The constitutionality of a warrantless arrest for a *felony* committed outside the presence of an officer was not settled until 1976, and then by a divided United States Supreme Court. In *United States v. Watson*, 423 U.S. 411 (1976), the Court declared constitutional a daytime warrantless arrest in a public place for a felony committed outside the presence of the officer. The Court upheld the warrantless felony arrest in that case, reasoning that such an arrest is based on accepted common law doctrine of arrest and that if fel-

When the defendant made the point that the offense here is civil, the state agreed that there is no indication that the offense is criminal. The state in its final brief argues that because the defendant did not raise the question of whether the offense here indeed was a crime, that issue has been waived. I conclude that, regardless of the issue of waiver, the validity of sec. 345.22 is an important issue for this case and law enforcement, and we should under our discretionary powers reach it.

ony arrests were permissible only with a warrant or only in exigent circumstances effective criminal law enforcement would be significantly handicapped. The reasoning of the *Watson* case cannot be applied to uphold sec. 345.22. I cannot find that the common law allowed a warrantless arrest for the violation of a civil offense committed outside the presence of an officer. The police apparently have the authority to issue a traffic citation to a person who violated a traffic law ordering the person to present himself at court at a certain time. If we conclude that the police officer must get a warrant to arrest such a person, the effective enforcement of the traffic law will not be significantly handicapped and the constitutional protection of the sanctity of the home will be enhanced.

I have found no cases, and the majority cites none, upholding a warrantless arrest, either in a public place or in a home, for a civil traffic offense committed outside the presence of the officer. All the cases and commentary cited by the majority address the question of the validity of an arrest for a violation of a criminal statute. In *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967), the Court concluded that in the absence of compelling urgency a warrantless administrative public health search of a home violates the fourteenth amendment. Neither the defendant nor the state discusses the question of the validity of sec. 345.22. Because the validity of sec. 345.22 is of significance to traffic law enforcement in general, I would ask the parties for further briefing on this question.

At this stage, however, I wish to express my doubts about the constitutionality of sec. 345.22, Stats. 1977, to the extent that it authorizes a warrantless arrest on probable cause for a civil traffic offense committed outside the presence of an officer. Requiring a warrant in

civil traffic cases would protect the privacy of the individual guaranteed by the constitution and would not unduly burden law enforcement. If there are exceptions to the warrant requirement in civil traffic cases, these have to be defined.

Assuming arguendo that the law applicable to warrantless felony arrests can be applied without change to warrantless arrests for civil traffic offenses committed outside the presence of a police officer, I conclude there was no probable cause or exigent circumstances.

Probable Cause. In reviewing the decision of the circuit court as to probable cause, this court will not overturn findings of fact unless against the great weight and clear preponderance of the evidence, but this court will independently examine the record to make its own determination of the legal question, namely, whether the constitutional requirement of probable cause is satisfied.

The circuit court in this case stated its decision from the bench. The circuit court merely concluded that "the police did have probable cause to believe that the defendant had committed the offense of operating while under the influence." The circuit court did not make any findings of fact, did not make any analysis or summary of the facts, and did not analyze the legal principles it used to reach its legal conclusion.

There are disputed facts in this case and the credibility of witnesses is at issue. Generally where the circuit court does not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made the finding in the way that supports its decision. *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). See also *State v. Fillyaw*, 104 Wis. 2d 700, 727–28, 312 N.W.2d 795 (1981) (Abrahamson, J., concurring). The majority's de novo review of the record must therefore be to determine the legal signifi-

cance of the facts, not to decide the disputed facts and the credibility of witnesses.

When an arrest is made without a warrant the state bears the burden of proving the existence of probable cause. *Leroux v. State*, 58 Wis. 2d 671, 682, 207 N.W.2d 589 (1973). In the case at bar a determination by this court of the legal question of probable cause to believe that the defendant was driving while under the influence of an intoxicant turns on three pieces of information known to the officer making the arrest.

The first piece of information is the ownership of the car. This information is relied upon to establish that it is probable that the defendant was the driver of the car. Jablonic did not describe the driver sufficiently for the officer to be able to identify the defendant as the driver. The officer had to reason that because the defendant was the owner of the car, he was probably the driver.

The second piece of information on which the determination of probable cause turns is that the defendant had been arrested previously in an alcohol-related disturbance. This information is relied upon to establish that the defendant was probably intoxicated. There is no indication in the record as to the nature of the alcohol-related disturbance; as to whom, if anyone, was intoxicated during this alcohol-related disturbance; as to the nature of the offense for which the defendant was previously arrested; whether there was any finding of probable cause for the arrest; or whether any further civil or criminal proceedings against the defendant resulted from the arrest. The majority opinion says that the officer "did *correctly* recall" the arrest. (Emphasis added.) *Supra*, p. 325. See also *supra*, pp. 331, 332 where the majority states that the officer's recollection was accurate and correct. There is nothing in the record which indicates whether the officer's recollec-

tion about the previous arrest of the defendant is correct or incorrect.

I need not reach the question of when a defendant's previous arrest may be relevant and probative in determining probable cause. In the case at bar the officer's testimony as to the defendant's prior arrest is so sketchy and subject to so many interpretations that neither the circuit court nor this court can use the information about the arrest to help form its independent determination whether the facts in the possession of the officer are as a matter of law sufficient to constitute probable cause.

The third, and most important, and perhaps the only piece of information on which the determination of probable cause turns, is Jablonic's statement to the officer. This information is relied upon to establish that the driver was probably intoxicated. The critical element in determining probable cause in the case at bar is whether the information which Jablonic, a reliable eyewitness, gave the police officer is sufficient to lead a reasonable police officer to believe that the driver was probably driving under the influence of an intoxicant.

Jablonic, the only person available with first-hand information about the driver and his driving, testified that the driver was walking and speaking with difficulty and that he was either intoxicated or sick. Even though, as he testified, he was familiar with the signs of intoxication, Jablonic had good reason to be uncertain. The weather was bad, and visibility was poor. Further, Jablonic was not able to verify or discard his intoxication theory because he did not have the opportunity to smell any alcohol when the driver spoke to him and asked him for a ride. I acknowledge that the mere fact that an innocent explanation for the driver's conduct, that is, illness, may be imagined is not enough to defeat probable cause. 1 LaFave, *Search and Seizure*, sec. 3.2(e), pp. 483–84 (1978). But in this case the innocent explana-

tion for the driver's conduct is not imagined; the innocent explanation is provided by the only witness, and it is provided as a real possibility.[3] The majority, without explanation and without any basis in the record, characterizes Jablonic's reference to illness as "merely a remote possibility which provided an alternative, more charitable explanation." *Supra*, p. 325.

The officer's testimony of what Jablonic told him is inconsistent with Jablonic's testimony. The officer testified that Jablonic had a definite opinion that the driver

[3] Jablonic's entire testimony as to what he told the police officer concerning the driver's condition is as follows:

"*Q.* What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

"*A.* I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

"*Q.* What did you base your opinion on that he was inebriated?

"*A.* Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

"*Q.* You have seen people or persons under the influence of an intoxicant before?

"*A.* Working at the University, it's a common—very common to see many inebriated people, unfortunately."

Jablonic described the driver as follows:

"*Q.* Did you notice anything about this person?

"*A.* They had a kind of a wet leather jacket on or something that looked like a reddish-brown jacket, as what I can recall. It was evening. It was raining and wet. It might have been even a sportcoat that was just wet. And they stood by the window of the car, which I rolled down.

"*Q.* All right, did you have an opportunity to observe the way this person walked?

"*A.* It was very unsteady and unsure. And—the person that just wasn't very well would walk like that.

"*Q.* And did you—did this person get close enough to you that you could observe his breath?

was intoxicated.[3] Other aspects of the officer's testimony, however, indicate that Jablonic had conveyed his uncertainty to the officer as to whether or not the driver was intoxicated. The officer's own testimony indicates that he went to the defendant's residence to investigate the defendant's condition, not to arrest the defendant. Thus in response to the question as to what was the officer's "mental intent, when you went into the house, to have him arrested for drunken driving," the officer answered,

"Well, it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

It was only after making the warrantless entry into the home, observing the defendant "wringing wet," seeing in the bedroom defendant's clothes which matched the clothes Jablonic described and smelling alcohol that the officer himself concluded he had sufficient information to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant and decided to arrest the defendant.

Although the majority states that the circuit court reached "the conclusion that Jablonic conveyed the definite impression that the driver was intoxicated" (*supra*,

"*A*. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell his breath."

[3] Officer Daley testified as to his conversation with Jablonic as follows:

"*Q*. Do you recall whether or not he [Jablonic] said anything about this individual being under the influence?

"*A*. Yes, he had a definite opinion about that.

"*Q*. What did he tell you?

"*A*. He said the man was very obviously intoxicated."

p. 324), nowhere in the record did the circuit court state such a conclusion or even hint it reached such a conclusion. The circuit court's only reference to Jablonic's testimony is a reference by the circuit court to its notes which quote Jablonic as telling the officer that the driver was either sick or intoxicated. If any conclusion of the circuit court might be gleaned from the record as to the circuit court's finding of credibility as to Jablonic's or the officer's version of what Jablonic told the officer, and I do not know that any can be, it is that the circuit court relying on its notes concluded that Jablonic offered two explanations to the police officer for the driver's conduct—intoxication and illness. The most appropriate construction of the record is, however, that the circuit court concluded that it need not decide which witness to believe because whichever witness it believed the evidence was adequate to establish probable cause.

The majority seeks to bolster its conclusion that the officer had probable cause by relying on the officer's testimony as to what the daughter and the wife said when the officer entered the house. The daughter was not present to testify. The wife, without objection, related the daughter's version of what had happened, and the wife's testimony contradicts the officer's. The circuit court expressly avoided having to determine whose testimony it believed, the wife's or the officer's, and therefore the majority cannot use the officer's disputed testimony to bolster its conclusion.

Although the subjective conclusions of the police officer concerning the existence of or lack of existence of probable cause do not bind a court, the officer's apparent decision in the case at bar that the eye-witness furnished information sufficient to warrant further investigation but did not furnish information sufficient to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant has some weight in this court's independent determination

of whether the information relayed to the officer was sufficient. Instead of saying that he intended to arrest the defendant but that he would have refrained from making the arrest if he found that the defendant was not intoxicated, the officer concluded on the record that it was his "intent to investigate . . . and make a determination." The majority cannot, try as it will, change the officer's words.

On the basis of the record in this case, I conclude that the state did not present sufficient facts to prove that information in the officer's possession was sufficient to satisfy the constitutional standard of probable cause. I conclude that when the officers entered the residence, they could only suspect that the defendant may have been the driver and that the driver may have been under the influence of an intoxicant. Reasonable suspicion (that is, ample factual justification falling short of what is required to support arrest or search) may be sufficient to justify further investigation, and in some situations, to justify a stop but it is not sufficient to justify a warrantless arrest. *Brown v. Texas*, 443 US 47, 51 (1979); *Terry v. Ohio*, 392 US 1, 22 (1968); *Wong Sun v. United States*, 371 US 471, 479 (1963); *State v. Cheers*, 102 Wis. 2d 367, 386–87, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 465–66, 251 N.W.2d 461 (1977).

The majority opinion, in the section entitled probable cause, discusses the government's interest in eradicating drunk driving. *Supra*, pp. 333–335. The relevance of this discussion is not readily apparent. First, granting the police the power that the majority does in this case "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." *Delaware v. Prouse*, 440 U.S. 648, 660 (1979). The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are described as drunk

or sick and who caused no damage to property or person is marginal at best.

Second, if the police officer had probable cause to make the arrest, the government's interest and the seriousness of the offense are irrelevant. If the police officer did not have probable cause to arrest, the arrest is unconstitutional and the government's interest and the relative seriousness of the offense are irrelevant. If the majority's discussion of the government's interest is the majority's way of saying that the seriousness of the offense is a factor for the police and the courts to consider in determining probable cause, the majority is making a dramatic change in the law of probable cause and is establishing a balancing, sliding scale test that would be difficult for both police and courts to comprehend and apply. 1 LaFave, *Search and Seizure*, sec. 3.2(a), pp. 450–58 (1978).[4]

[4] In determining probable cause there is no balance or weighing of the gravity of the public concerns served by the arrest and the severity of the interference with individual liberty. The balance has been made by adopting the requirement of probable cause. As the United States Supreme Court has said, "The requisite 'balance' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

The majority at one and the same time appears to negate and to inject a balancing test in determining probable cause. The majority says at *supra*, p. 327 that "although the State must prove the existence of both probable cause and exigent circumstances, *negating any implication of adherence to a mere balancing test*, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis." (Emphasis supplied.) The progeny to which the majority refers are *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), and *Bies v. State*, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1976) (quoting *Browne v. State*, 24 Wis. 2d 491, 507, 129 N.W.2d 175 [1964] cert. denied, 379 U.S. 1004). These cases involve an investigation or a stop which requires something less than probable cause. An investigation and a stop may be justified even if there

Exigent circumstances. Even if there is probable cause to believe the defendant has committed a *felony*, a warrant is required to enter a home unless exceptional circumstances are present which justify a warrantless entry. *United States v. Johnson*, — U.S. — (June 21, 1982); *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278 (1978). *Payton* and *Laasch*, upon which the majority relies, are authority only for the proposition that a warrantless arrest in a home may be permissible under exigent circumstances if the officer has probable cause to believe a *felony* has been committed. These cases are not authority for a rule that a warrantless arrest can be made in a home under exigent circumstances if the crime is a misdemeanor or if the offense is a civil traffic offense. The majority cannot assume that the *Payton* and *Laasch* rule is automatically applicable to this case. The issue which must be decided, not assumed, is under what circumstances, if any, is a warrantless entry in a home at night to effect an arrest for violation of a civil statute constitutional? Does the government's interest in enforcing the civil law and collecting a forfeiture ever

is no probable cause as long as there is "mere 'reasonable suspicion.'" *Dunaway v. New York*, 442 U.S. 200, 211 (1979). Reasonableness in the probable cause context revolves around whether the officer has *reasonable* grounds to believe that the defendant probably committed a crime. Reasonableness in the context of an investigation or stop involves balancing the gravity of the state's interest and the nature of the invasion of the privacy of the person. The majority's shifting back and forth between the balancing test justifying an investigation or stop and the concept of probable cause justifying a search or an arrest may very well explain why the majority reaches the conclusion it did in this case that the intrusion in the defendant's home and his arrest were constitutional.

The court of appeals used a balancing test in this case to determine exigency, not in the issue of probable cause. See note 5 *infra*.

outweigh an individual's expectation of privacy in his or her home?

Even if I were to assume that the *Payton-Laasch* rule is automatically applicable to this civil forfeiture case, I conclude the record is not adequate to find exigent circumstances.

The exigent circumstances doctrine, like all exceptions to the warrant requirement, must be viewed as a narrow exception to the protections of the fourth amendment. In *McDonald v. United States*, 335 U.S. 451, 456 (1948), the Court said: "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that cause *imperative*." (Emphasis added.) See also *Laasch v. State*, quoted *supra* at page 3 of this dissent.

Although the United States Supreme Court has on several occasions spoken of exigent circumstances, the Court has not clearly defined what are exigent circumstances or established standards to measure the existence of such exigent circumstances. In this case, the circuit court appeared to conclude that the exigency arose out of hot pursuit and the need to preserve evidence of intoxication. The majority, on the other hand, identifies three exigent circumstances, that is, three urgent circumstances that make resort to the warrant process impracticable: (1) the need to prevent the offender's escape (hot pursuit); (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent the destruction of evidence.

The majority opinion does not establish standards by which the existence of the exigent circumstances are to be tested. For example, the majority does not explain whether the test for a valid warrantless entry under the exigent circumstances doctrine is a subjective one, an objective one, or both. In *State v. Prober*, 98 Wis. 2d

345, 365, 297 N.W.2d 1 (1980), the court adopted a two-step analysis (subjective and objective) for application of the emergency doctrine, an exception to the warrant requirement which is similar to the exigent circumstances doctrine. Under *Prober*, the warrantless search is invalid unless the officer is actually motivated by the perceived emergency, that is, to render aid or assistance (subjective test). Second, "even though the requisite motivation is found to exist," the warrantless search is invalid unless a "reasonable person under the circumstances would have thought an emergency existed" (objective test).

If the *Prober* two-step analysis for the emergency doctrine is not applicable to the exigent circumstances doctrine the majority ought to tell us why.

This case cannot meet the *Prober* subjective test. The officer did not testify that he believed he had to arrest the defendant immediately in order to prevent the defendant from escaping or in order to protect the defendant or the public from the danger of the defendant driving another automobile that night. The officer does refer to the fact that alcohol dissipates with the passage of time. But the officer said that his subjective motivation was to investigate immediately, to determine if the defendant was drunk. The officer did not testify that he believed he had to arrest the defendant immediately to preserve the evidence. He said he went into the house to determine whether the defendant was drunk and if so he would then attempt to preserve the evidence.

This case also cannot meet the *Prober* objective test of exigent circumstances.[8] The essence of the exigent cir-

[8] In applying the objective standard, federal and state courts have, according to the commentators, taken one of two approaches in attempting to articulate the facts which bear on the determination of exigent circumstances: the checklist approach articulated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en

cumstances doctrine is the degree of urgency to make the arrest or search created by the exigency and the amount of time it would take to obtain a warrant.

The warrantless entry in this case cannot be justified as necessary to prevent the defendant from escaping arrest or to prevent physical harm to the driver or to the public. The police had the defendant's name and address. There is nothing in the record to indicate that the police thought he would leave the jurisdiction or would not be available for arrest unless he was pursued and arrested immediately. The majority speculates, without anything in the record supporting this speculation, that the defendant (whose car was in the field and who, as the police officers found out when they knocked on the door, was in

banc) or the totality of the circumstances test. See Harbaugh and Faust, *"Knock on Any Door"—Home Arrests after Payton and Steagald*, 86 Dick. L. Rev. 191, 224-25 (1982); Donnino and Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90 (1980); 2 LaFave, *Search and Seizure*, sec. 6.1, pp. 388-95 (1978).

Judge Gartzke, writing for the court of appeals, used a balancing test to determine whether the exigency justified the intrusion. He assumed that this case involved a misdemeanor and concluded that although there was urgency to avoid destruction of evidence, the urgency in this case was not sufficiently great to justify a warrantless arrest in the home. He noted that the "misdemeanor" in this case was not a grave offense. The defendant had not injured any person or property. The defendant's wife and daughter were in no danger. The defendant was in no danger; he was upstairs in bed. An intrusion by the police into a bedroom at night is a serious intrusion on privacy. Entry into the home is ordinarily afforded the most stringent fourth amendment protection. Judge Gartzke's approach of looking at the entire case and balancing the government's need for immediate police action and the defendant's interest in privacy in the home is interesting and worthy of discussion and consideration. It also seems to fit into the majority's keen interest in balancing and reasonableness. Unfortunately the majority ignores the approach of the court of appeals.

bed) had to be arrested immediately to prevent him from driving another car. The "threat to safety" exception must be limited to situations where the officer has reasonable factual justification to believe the defendant intends to drive again. Without this limitation, in every case involving probable cause to believe that the person was driving under the influence, the police would be justified in making a warrantless entry into the home to arrest the person.

The threatened destruction or removal of evidence presents a more difficult issue of exigent circumstances. It is beyond question that alcohol "disappears" over a period of time and that the evidence of intoxication will be destroyed by the passage of time. But neither the record nor the majority opinion describes the degree of urgency to make the arrest, that is, how long a time period may elapse before the alcohol has disappeared, and the amount of time it would take to obtain a warrant in the city of Madison at 9:30 at night.

Drugs can be flushed down a toilet in seconds. Money or bloody clothes can be burned within minutes. When we talk about "destruction" of the evidence of intoxication we are talking about hours.

Sec. 345.24, Stats. 1977, indicates that it may take up to four hours to allow an intoxicant's blood alcohol content to metabolize to a "safe" level. Sec. 885.235(3), Stats. 1977, states that chemical tests performed within two hours of the event to be proved are given prima facie effect without expert testimony; tests performed more than two hours after the event to be proved are admissible as evidence if expert testimony establishes its probative value and prima facie effect. Thus police can perform the test more than two hours after the event and still have acceptable evidence to present in court. In *State v. Bentley*, 92 Wis.2d 860, 286 N.W.2d 153 (Ct. App. 1979), a blood sample was taken from the accused

three and a half hours after the accident, and the results were apparently damaging to the accused's position. Sec. 885.235(3) was amended in 1982 to provide that samples taken within *three* hours are given prima facie effect without expert testimony; tests not taken within three hours after the event are admissible only if expert testimony establishes their probative value and prima facie effect. See ch. 20, sec. 1816(c) and (e), ch. 184, sec. 5, Laws of 1981.

In this case the police zeroed in on the identity of the defendant in about one half hour after the event to be proved. It is up to the state to introduce evidence that resort to the warrant process was impracticable because the warrant and any test for intoxication would come too late. Yet the state introduced no such evidence. Nor are there scientific facts or facts relating to the practice in Dane County as to the issuance of warrants of which this court might take judicial notice to justify the conclusion that a reasonable officer might reasonably have believed that he had to preserve the evidence from destruction and had no time to get a warrant. Because the state has not met its burden of showing that its warrantless entry was "imperative," I would hold that the circumstances were not exigent.

Accordingly, I would affirm the decision of the court of appeals and remand this case to the circuit court to determine the issue of consent.

To preserve the federal and state constitutional guarantees of the sanctity of the home against the knock on the door in the middle of the night by government officers who do not have a warrant issued by a judicial officer, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins this dissent.

COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 26 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-1686

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing, defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and that "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when

the police arrived and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view, the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. ___ (decided April 21, 1981); Payton v. New

York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976), when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the

fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled to special dignity and sanctity." Laasch v. State, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis.2d 860, 286 N.W.2d 153 (Ct.App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court

whether the officers entered the defendant's home with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

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[1] Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for findings on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

EAST TEN-O

STATE OF DISPOSITION

Uniform 1973-859

STATE OF WISCONSIN — COURT: COUNTY OF DANE — CITY MADISON

STATE of WISC. vs. Defendant and on 04-24 1978 at 849 AM (PM) Violation — Date No. — Time No.

Name-First — Middle Initial — Last: LOWARD G WELSH

Address (Residence) 7158 TREE LN — Post Office MADISON — State WISC — Zip

Birthdate 09-02-33 — Driver's License — State

Veh. Plate YE 1289 — Yr. 78 — State WISC — Make BUICK — Type PC

Trailer Plate — Yr. — State — Make — Type

Accident Yes — Arresting 342.62 UK 9 — 10 Violation

M P H: Act 1 — Legal 1 — Over — Describe violation: OPERATING MOTOR VEHICLE WHILE INTOXICATED

On Hwy/Street: 7200 MOORE PT

At: WEST POINT RD

County: DANE — City/Village/Town: MADISON

Officer's Signature: Richard J Dorn — Badge No. 1834 — Dept. MADISON POLICE

YOU ARE HEREBY NOTIFIED TO APPEAR IN THE ABOVE NAMED COURT

Chem Test — Refer

ON AUG 24 1978 AT 11:00 (AM) (PM)

Located at: CITY COUNTY BUILDING

Other

Operating as: Operator — Chauf — School Bus Op

Driver Description: Sex M Race W Eyes — Hair — Wt. — Ht.

ACCIDENT: Fatal — PI — PD — HIGHWAY: Type — Sys — Num — Lanes 4

MVD-4018-78 (1) Wisconsin Uniform Citation and Complaint s. 345.11 Statutes

4

080-2141/7781

12

STATE OF WISCONSIN, Plaintiff,

vs.

EDWARD G. WELSH, DOB 9/2/33
7158 Tree Lane
Madison, Wisconsin, Defendant.
Address

CRIMINAL COMPLAINT & SUMMONS

James Joachim, being first duly sworn, on oath says that on April 24, 1978, at the City of Madison, in said County, the defendant did: unlawfully and intentionally operate a motor vehicle while under the influence of an intoxicant; contrary to Section 346.63(1)(a) of the Wisconsin Statutes; and upon conviction may be imprisoned not less than five days, nor more than one year, and in addition may be fined not more than $500.00;

contrary to Sec. 346.63(1)(a), Wisconsin Statutes, and prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offense is:

*1) FACTS: On April 24, 1978, at approximately 8:49 p.m. Madison Police Officer Daley was dispatched to the area of Westfield Place and Mineral Point Road, City of Madison, Dane County, Wisconsin, with reference to a vehicle driving on the cemetery. Upon arrival at said location, Daley states that he contacted Randy Jablonic, who stated that he was driving on Mineral Point Road when he observed a vehicle proceeding inbound on
(Continued on reverse side.)

*Subscribed and sworn to before me

James Joachim
Complainant

Mary Beth Keppel
District Attorney

**Approved for filing Mary Beth Keppel
District Attorney

SUMMONS

STATE OF WISCONSIN, Plaintiff,

vs.

EDWARD G. WELSH, Defendant.

THE STATE OF WISCONSIN TO SAID DEFENDANT:

The original of the above Complaint having been issued, accusing the defendant of committing the crime of OMVWI, contrary to Sec. 346.63(1)(a).

You are therefore, summoned to appear before the Judicial Court Commissioner of Dane County at the Courthouse in the City of Madison to answer said Complaint, on March 7, 1980 at 11:00 a.m. and in case of your failure to appear, a warrant for your arrest may be issued.

Dated 2/25/80.

Mary Beth Keppel
District Attorney

No CR-CX (Adopted 1970) CRIMINAL COMPLAINT & SUMMONS Section 968.04

continue to cross the median and drive onto the [illegible] Memorial Gardens Cemetery grounds for approximately 150 feet. Jablonic stated that he observed the driver of this vehicle, later identified as Edward G. Welsh, exit the vehicle and stumble as if he was intoxicated. Jablonic stated that Welsh asked him if he would not call the police, and Welsh then left the cemetery and staggered off in a north-easterly direction towards Tree Lane. Jablonic described Welsh as being a white male about 40 years old, 5'8" tall, and stated that Welsh was wearing a tan leather coat and light pants. Jablonic also stated that the vehicle Welsh was driving was a 1974 Buick with Wisconsin license number YE1289. Daley states that he ran the above information through the Department of Motor Vehicles which indicated that the above vehicle was registered to the defendant, and that the defendant's address was 7158 Tree Lane. Daley stated that he then proceeded to that location where he contacted the defendant's wife, Patricia Welsh, who stated that her husband, Edward Welsh, just minutes earlier, stumbled into the house, highly intoxicated, and that he just went straight to bed. Daley stated that he then contacted the defendant, who fit the general description previously given, and was wearing clothing that matched the description which was supplied by Jablonic. Daley stated that the defendant was then arrested for operating a motor vehicle while under the influence of an intoxicant and issued a citation for the same. (A copy of the citation is incorporated in this complaint.)

**2) AND THAT THIS COMPLAINT IS BASED ON: Information and belief of your complainant, an Officer with the Madison Police Department, who has read the reports of Officer Daley, whom your complainant believes to be truthful and reliable based upon past professional contacts and whose reports have always proven to be truthful and reliable. Your complainant further believes the statements of Randy Jablonic to be truthful and reliable in that he is a citizen informant and eye witness to the above offense. Your complainant further believes the statement of Patricia Welsh to be truthful and reliable in that she is a citizen informant.

SUMMONS

DANE COUNTY CIRCUIT COURT
(Criminal & Traffic Court)

STATE OF WISCONSIN

vs.

EDWARD G. WELSH

State of Wisconsin }
City of Madison } ss.
County of Dane }

I hereby certify that at _____

o'clock in the (A)(P).M., on the _____

y of _____, 19___, at the

_____ of _____,

ounty of _____, State of Wisconsin,
erved the within summons on the within named
efendant by delivering to and leaving with him
personally, a true and correct copy thereof, and
also certify that at the time of said service I
ndorsed upon the copy so served, the date and
ce upon which same was served and signed my
me thereto, and added thereto my official title.

_____

_____

ES:
Service .....$_____
Travel .....$_____
Total .....$_____
ed this _____ day of _____

_____.

Clerk of the Circuit Court
Madison, Wisconsin

_____

RECEIVED
NOV 18 1981
Clerk of Supreme Court, Wis.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, THAT VACATED AND REMANDED THE ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE MARK A. FRANKEL, PRESIDING.

BRIEF AND APPENDIX OF PETITIONER

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
THAT VACATED AND REMANDED THE ORDER
OF THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF PETITIONER

ISSUES

1. Should an appeal from an order under sec. 343.305, Stats., to suspend a defendant's operating privileges for failure to submit to a breathalyzer test be decided by a panel of three court of appeals judges or one court of appeals judge?

This appeal was decided by one court of appeals judge.

2. Did the police have probable cause to arrest and did the facts present exigent circumstances so that the warrantless arrest of the defendant in his home for operating a motor vehicle while under the influence of

intoxicants was valid under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?

Trial court answered: yes.

Court of appeals answered: no, because the case did not present exigent circumstances.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that oral argument would be helpful in discussing the application of relevant fourth amendment law. The state believes that publication is warranted in order to provide a statement on the correct application of the fourth amendment law.

STATEMENT OF THE CASE

Edward Welsh, the defendant, was arrested at his home on April 24, 1978, and issued a citation for operating a motor vehicle while under the influence of intoxicants (4; 13:27, 38). After being arrested, the defendant was taken to the police station where he refused to take the breathalyzer test (5; 10:5, 8).

On September 5, 1980, a hearing was held in the circuit court to determine whether the defendant's refusal to take the breathalyzer test was reasonable (10:3). At the refusal hearing, the defendant's attorney argued that the arrest was invalid and that as a result the trial court

had no jurisdiction and the refusal to take the breathalyzer was reasonable (10:11, 24).

The court ruled that it was bound by its decision in an earlier hearing that the arrest was valid (10:39). At the earlier hearing, the court had concluded that the warrantless arrest of the defendant in his home was valid because the police had probable cause to believe that the defendant had committed a crime and exigent circumstances existed because it was necessary to take the breath sample to avoid dissipation of the alcohol (14:34, 35). At the conclusion of the refusal hearing, in addition to finding that the arrest was valid, the court concluded that the refusal to take the breathalyzer test was unreasonable (10:45-46). The court therefore ordered suspension of the defendant's operating privileges for the statutory period of sixty days (10:46).

The defendant appealed from the circuit court order suspending his license (11). In the notice of appeal, the defendant stated that the appeal was within sec. 752.31(2), Stats. With this statement, the defendant was claiming that the appeal should be decided by one judge of the court of appeals.

On May 26, 1981, Judge Gartzke issued the one judge decision of the court of appeals (Pet. App. 101-08). In the decision, Judge Gartzke concluded that the warrantless arrest of the defendant in his home was invalid because the state had not established the existence of

exigent circumstances. Judge Gartzke therefore vacated the circuit court order and remanded the case to the circuit court for further findings in which the circuit court was to determine whether the entry into the defendant's home was made with consent.

The State of Wisconsin petitioned for this court to review the decision of the court of appeals; and this court granted the state's petition.

FACTS

In an evidentiary hearing held on July 14, 1980, Randy Jablonic testified that between 8:30 and 9:00 p.m. on April 24, 1978, he was traveling east on Mineral Point Road in Madison when he saw a car in front of him that was driving extremely cautiously, first traveling very, very slowly and then a little faster (13:8, 16). Jablonic saw the car go from side to side on the road; and as the car approached a boulevard near West Towne shopping center it headed for the median where there was a sign telling drivers to stay to the right (13:9). Jablonic said that although the car was not traveling at an excessive rate of speed, it was weaving back and forth (13:9). Jablonic saw the car veer to the left lane, and when a car approached from the east the car in front of Jablonic veered left and drove into a cemetery, or open field, where the car stalled or got stuck (13:9). According to Jablonic, it was raining, the ground was wet and the visibility was bad

(13:8, 9). Jablonic drove past the defendant's car, turned around and pulled up behind the car to keep it from returning to the road (13:10). Jablonic stopped another car and asked the driver to call the police (13:10). When Jablonic saw the defendant drive further onto the grassy area, Jablonic drove to a side road in fear that the defendant would try to come out at that point (13:10). Jablonic saw the defendant leave his car and head northeast; and shortly thereafter, the defendant came to Jablonic's window (13:11). According to Jablonic, the defendant had a wet leather jacket and the defendant's walk was unsteady and unsure (13:11). After standing by Jablonic's truck for quite some time, the defendant asked if Jablonic would give him a ride home (13:11). Jablonic said no, that they had better wait for help to get the car out (13:12). According to Jablonic, the defendant then broke into a slurred conversation: "You wouldn't get the cops" (13:12). Jablonic said the defendant was concerned that Jablonic would call the cops (13:12). The defendant left and Jablonic watched him walk north and then east (13:12).

Jablonic testified that three to five minutes after the defendant had left the police arrived; and Jablonic told the officer that the defendant was very inebriated or very sick or not very much in possession of his faculties (13:13, 14). Jablonic told the officer that the defendant had taken off across the the field (13:14).

Jablonic explained that he had decided the defendant was inebriated because of the erratic motion of his car and the staggering and slurred speech (13:14). Jablonic pointed out the defendant's vehicle to the police (13:15).

Jablonic said that the total time from the beginning of the incident to the time the defendant left Jablonic's truck was, by far, fifteen to twenty minutes (13:22). Jablonic said that when the police arrived he went to them immediately and told them what had transpired (13:24). Jablonic said that his conversation with the police took less than five minutes (13:25).

City of Madison Police Officer Richard Daley said that at 8:49 p.m. he was dispatched to Westfield Drive on Mineral Point Road where he met Jablonic (13:27). Daley said Jablonic gave him information about an individual operating under the influence and Jablonic pointed out the car the person was driving (13:27). Daley ran a check on the license number on the car and was informed that it was registered to Edward Welsh of 7158 Tree Lane (13:28). Jablonic had pointed out the direction that the person had taken and it was toward Tree Lane (13:28-29). Jablonic described the incident he had observed and he described the defendant. Jablonic told Daley that the defendant was very obviously intoxicated and that he had seen the defendant driving the car (13:30). After spending less than five minutes with Jablonic, Daley proceeded directly to 7158 Tree Lane, which took less than one and one-half minutes

(13:30). Daley said that a week or two earlier he had visited that address of Edward Welsh for an alcohol-related disturbance (13:30-31).

Daley testified that he arrived at the address along with Officer Harless and they knocked on the door (13:31). Daley said that when the defendant's step-daughter opened the door they informed her that there had been an accident and that they suspected that the defendant had the accident and had run home (13:31). When they asked if they could speak with the defendant, the step-daughter said that he had just stumbled in and she allowed the police to come in (13:31, 32). Daley said the step-daughter opened the door and said the defendant was upstairs (13:32). According to Daley, as the police started up the stairs, Mrs. Welsh appeared and asked what was going on (13:33). The police told Mrs. Welsh that there had been accident and they strongly suspected that the defendant was involved and they wanted to speak to him because they thought he was probably under the influence of intoxicants (13:33). According to Daley, Mrs. Welsh said the defendant was in bed and showed the police where the bedroom was (13:33, 34). Daley said that both officers were in uniform (13:34).

On the way up the stairs Daley saw wet and muddy tracks going to the bedroom and in the bedroom he saw the defendant lying in bed with no clothes on and muddy pants next to the bed (13:37). Daley said they asked the

defendant to get up and put his pants on because they wanted to speak to him (13:37). According to Daley, the defendant needed help in getting his pants on and so the police had to hold him up (13:37, 39). Daley said that in speaking with the defendant they noticed that the whole room smelled of alcohol and that the defendant had a very heavy odor of alcohol about his person (13:37). Daley said that the defendant's speech was slurred and that the defendant and his wife and his step-daughter had all said that the defendant had not had anything to drink since entering the home (13:37). Daley said that when they were in the bedroom they informed the defendant that he was under arrest for operating under the influence of intoxicants (13:38). Daley explained that when an arrest is made for operating under the influence the police must get the person downtown as soon as possible for a breathalyzer test because the alcohol dissipates from the body after a certain period of time (13:38). Daley said that the defendant was issued a citation for driving while under the influence of intoxicants (13:40).

The defendant's wife, Patricia Welsh, testified that a half hour to forty-five minutes had elapsed from the time the defendant came home to the time the police arrived (13:50). She also denied that she told the police that the defendant was highly intoxicated (13:51).

ARGUMENT

I. IN THE COURT OF APPEALS THIS APPEAL SHOULD HAVE BEEN DECIDED BY A PANEL OF THREE JUDGES.

In the court of appeals this appeal was decided by one judge. The state submits that the appeal should have been decided by three judges.

Section 752.31, Stats., provides that, with the exception of those cases listed in subsection (2), the court of appeals shall sit in panels of three judges. Specifically, sec. 752.31, Stats., provides, in part:

> (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of three judges to dispose of cases on their merits.
>
> (2) Appeals to or other proceedings in the court of appeals in the following types of cases shall be decided as specified in sub. (3):
>
> (a) Cases under ch. 799.
>
> (b) Municipal ordinance violation cases.
>
> (c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).
>
> (d) Cases under ch. 51.
>
> (e) Cases under ch. 48.
>
> (f) Misdemeanors.

Pursuant to subsection (3) of sec. 752.31, Stats., the cases specified under subsection (2) shall be decided by one court of appeals judge, except that any

party on appeal or other proceeding may move that the case be decided by a three-judge panel.

In the instant case, the one judge who decided the appeal apparently felt that the case qualified as an exception to the three-judge requirement by meeting the specifications of sec. 752.31(2)(c), Stats., which provides for a one-judge appeal in cases "involving violations of traffic regulations, as defined in s. 345.20(1)(a)."

Section 345.20(1)(a), Stats., defines a traffic regulation as a provision in chapters 194 or 341 to 349 for which the penalty for violation is a forfeiture.

A forfeiture is "any penalty, in money or goods." See sec. 778.01, Stats.

The penalty for the unreasonable refusal to submit to a breathalyzer test is a suspension of the defendant's operator's privileges. See sec. 343.305(7), Stats. (1975). (The 1975 statutes are applicable to the instant case because the offense occurred in April, 1978, which was prior to the effective date of the major changes in sec. 343.305, Stats., that were made by ch. 193, secs. 7 and 8 of the Laws of 1977, which became effective on July 1, 1978.)

Therefore, the state submits that this case does not involve a traffic regulation because the unreasonable refusal to take a breathalyzer test does not result in a forfeiture; it results in suspension of the defendant's operator's privileges. Because violation of the refusal

law does not result in a forfeiture, the law is not a traffic regulation. Therefore, an appeal from an order to suspend the defendant's operating privileges in a refusal hearing is not an appeal in a case involving a traffic regulation. This means there is no authorization for a one-judge appeal; and in this case, the appeal should have been decided by a panel of three judges rather than one judge in the court of appeals.

It should be pointed out that a decision by this court that three judges should have decided this appeal may be of limited precedential value. Currently a bill is pending in the Legislature to provide that appeals in refusal hearings will be handled by one judge. The 1981 Assembly Bill 737 would modify sec. 752.31(2)(c), Stats., to provide: "Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a), and cases under s. 343.305." The proposed bill would thus add the words "and cases under s. 343.305." A note accompanying the proposed change explains that it would clarify that cases under sec. 343.305 are also decided as specified in subsection (3) of sec. 752.31, Stats. (Pet. App. 109-11).

The state submits that, despite the implication to the contrary in the note accompanying the bill, the present statute does not specify that appeals from orders in refusal hearings should be decided by one judge of the court of appeals. The applicable statutes clearly show that orders in refusal hearings do not qualify as cases

involving traffic regulations or any other case specified in sec. 752.31(2) as being subject to decision by one judge of the court of appeals.

Because this appeal was decided by one judge rather than three in the court of appeals, the court of appeals' decision could be reversed on that ground alone and the case remanded for a decision by three judges. However, the state requests this court to decide whether appeals from orders in refusal hearings should be decided by one judge or three judges of the court of appeals; and, even if the court decides that three judges should decide the appeals, the state requests that this court go on to decide the arrest issue that is raised in this review. The state believes that this procedure is preferable to remanding the case to the court of appeals for decision on the arrest issue because that procedure would result in a second decision by the court of appeals and a possible second review in the supreme court, all of which would cost the state and the defendant additional expenses. The state believes that since the arrest issue is currently before the supreme court, it would be in the interest of judicial economy for the court to decide that issue.

II. THE WARRANTLESS ARREST OF THE DEFENDANT IN HIS HOME ON A CHARGE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICANTS WAS VALID UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ART. I, SEC. 11 OF THE WISCONSIN CONSTITUTION BECAUSE AT THE TIME OF THE ENTRY INTO THE HOME THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAD COMMITTED THE CRIME AND THE CASE PRESENTED EXIGENT CIRCUMSTANCES.

At approximately 9:00 p.m. on April 24, 1978, the police arrested the defendant in his home on a charge of operating a motor vehicle while under the influence of an intoxicant, a misdemeanor.

The trial court ruled that the warrantless arrest of the defendant was valid because the police had probable cause to believe that the defendant had committed the crime and there was no time to obtain a warrant because of the need to take a breath sample from the defendant before the dissipation of the alcohol in his blood (14:34-35).

The court of appeals disagreed with the trial court and said there was not sufficient exigent circumstances to permit the police to make a warrantless entry into the defendant's home to make the arrest. In determining whether exigent circumstances existed, the court of appeals noted that in State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), and in Schmerber v. California, 384 U.S. 757 (1966), the courts concluded that it was not necessary to get a warrant before obtaining

blood samples from the defendants because the blood rapidly metabolizes alcohol and there was not sufficient time to get a warrant. State v. Welsh, No. 80-1686 (Ct. App. May 26, 1981), at page 6 of slip. op. (Pet. App. 106). However, the court of appeals distinguished Bentley and Schmerber on the ground that in those cases people were injured in accidents involving drunken drivers, but in the instant case, no one was injured. See Welsh, slip op. at 7 (Pet. App. 107). The court of appeals concluded that because the defendant's crime was not serious enough, the warrantless entry into his home to arrest him was unreasonable. See Welsh, slip op. at 7 (Pet. App. 107).

The state submits that the court of appeals erred in finding the entry unreasonable; and that the error occurred because the court, in applying a balancing test, placed undue emphasis on the seriousness of the crime the defendant was believed to have committed.

The state believes that the warrantless, nonconsensual entry into a suspect's home to make an arrest is valid under the Fourth Amendment to the United States Constitution and under art. I, sec. 11 of the Wisconsin Constitution when the police possess probable cause and the case presents exigent circumstances. Whether exigent circumstances exist does not have to depend on the seriousness of the crime the suspect is believed to have committed. The same level of probable cause and the same

exigent circumstances can justify the warrantless, nonconsensual entry to arrest for a misdemeanor as to arrest for a felony.

A. The basic rule for justifying a nonconsensual entry into a suspect's home to make a warrantless arrest is probable cause plus exigent circumstances.

The basic rule in regard to arrest in a suspect's home is that, in the absence of an arrest warrant and in the absence of consent to enter, the police need probable cause to believe the suspect committed the crime and exigent circumstances in order to make a constitutionally valid arrest. Payton v. New York, 445 U.S. 573 (1980), and Laasch v. State, 84 Wis. 2d 587, 591-93, 267 N.W.2d 278, 281-82 (1978).

In Payton, the Court did not reach the question of what type of circumstances would justify a warrantless entry. 445 U.S. at 583. In Laasch, this court strongly implied that the warrantless arrest would have been valid if the state had proven that the arrest was made in hot pursuit, or that there was a threat to the safety of other persons, or that there was a risk that evidence would be destroyed, or that there was a risk that the suspect would flee if the police took the time to obtain a warrant. 84 Wis. 2d at 589, 267 N.W.2d at 280.

As noted in Laasch, one type of exigent circumstance that justifies a warrantless, nonconsensual

entry to make an arrest is the preservation of evidence. If there is a sufficient risk that the delay caused by obtaining a warrant will result in the destruction of evidence, a warrantless entry to make an arrest based on probable cause is constitutionally valid. See 2 LaFave, Search and Seizure, sec. 6.1 at 392-93 n. 86. In several cases, appellate courts have held that the warrantless entry to make an arrest was justified because a delay occasioned by obtaining a warrant created a serious risk that evidence would be destroyed. See United States v. Kulcsar, 586 F.2d 1283, 1285-87 (8th Cir. 1978); United States v. Campbell, 581 F.2d 22, 24-26 (2nd Cir. 1978); United States v. Flickinger, 573 F.2d 1349, 1354-57 (9th Cir. 1978); United States v. Bustamante-Gamez, 488 F.2d 4, 8-9 (9th Cir. 1973); United States v. Mapp, 476 F.2d 67, 74 (2nd Cir. 1973); United States v. Davis, 461 F.2d 1026, 1029-31 (3rd Cir. 1972); State v. Nagel, 308 N.W.2d 539, 541-44 (N.D. 1981), and cases cited therein; and State v. Decker, 119 Ariz. 195, 580 P.2d 333, 336 (1978).

In Payton, 445 U.S. at 588-89, and in Laasch, 84 Wis. 2d at 594-95, 267 N.W.2d at 282-83, the courts said that warrantless entries, whether to make an arrest or to execute a search, implicate the same interest and are governed by the same constitutional principles. Each case relied on principles in search cases to decide its arrest issues.

Therefore, it is appropriate in the instant case to look to two search cases which have held that the rapid metabolization of alcohol in the blood justifies warrantless seizure of blood samples. Schmerber, 384 U.S. at 770-71, and Bentley, 92 Wis. 2d at 864, 286 N.W.2d at 155. In Bentley, the court said: "Blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." 92 Wis. 2d at 864, 286 N.W.2d at 155.

Therefore, the metabolization of alcohol in the blood creates an exigent circumstance that justifies a warrantless entry to make an arrest, if the police also have probable cause to believe the defendant committed the crime.

B. Exceptions to the warrant requirement are applied on a categorical basis.

The basic principle of the fourth amendment law is that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton, 445 U.S. at 586.

As to the arrest of a suspect in his home, an exception to the warrant requirement is recognized, and the seizure is valid, where the police have probable cause and exigent circumstances. See Payton and Laasch.

As with other exceptions to a constitutional requirement, the warrantless arrest exception is applied on

a categorical basis. The exceptions to the general fourth amendment requirements are recognized after "balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). However, this balancing test is conducted on a categorical basis, rather than on a case-by-case basis. The categorical application of the fourth amendment exception was noted in Camara, where the Court said: "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable unless it has been authorized by a valid search warrant.'" (Emphasis added.)

In Camara, in applying a balancing test to determine the reasonableness of the warrantless administrative searches, the Court looked to general policies and needs, not simply to the facts of the specific case before it.

In the instant case, the court of appeals erred in applying the balancing test only on the basis of the specific facts of the case. The court of appeals concluded that the risk of losing evidence in a misdemeanor case where no one was injured did not outweigh the defendant's right to privacy in his home.

The court of appeals therefore applied an incorrect analysis of fourth amendment law. The court should have looked to the categorical exceptions to the warrant requirement. The category of warrantless entry to

arrest based on probable cause and exigent circumstances justifies the arrest in this case.

The case-by-case approach used by the court of appeals in the instant case has been rejected by the United States Supreme Court. See Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the police seized the defendant, took him to the police station and questioned him even though they did not have probable cause to arrest. In holding the seizure invalid because the police did not have probable cause, the court noted that there were few exceptions to the requirement that the police have probable cause to seize the person. The first exception was created in Terry v. Ohio, 392 U.S. 1 (1968), the stop and frisk case. Dunaway, 442 U.S. at 208-09. The Court said it has been careful to maintain the narrow scope of Terry. 442 U.S. at 210.

In Dunaway, the State of New York asked the Court to apply a balancing test on a case-by-case basis and to permit custodial interrogations upon a mere reasonable suspicion. 442 U.S. at 211. The state was not clear on all the factors it proposed for the balancing test, but some of the factors were the manner and the intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter. 442 U.S. at 211 n. 14.

In rejecting the state's proposed test, the Supreme Court said in 442 U.S. at 213-14:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that did not amount to technical arrests. But the protections intended by the Framers could all to easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." . . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

(Footnotes and citations omitted.)

In New York v. Belton, ____ U.S. ____, 101 S.Ct. 2860, 2863 (1981), the Supreme Court reiterated its concern for a single, familiar standard to guide the police. The Court noted that the fourth and fourteenth amendment protections can be realized only if the set of rules governing them can be understood and applied by the police. The Court said in 101 S.Ct. at 2863:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, "Case-by-Case Adjudication" v. "Standardized Procedures": The Robinson Dilemma, 1974 Supreme Court Review 127, 142. This is because
>
> "Fourth Amendment doctrine, given force and effect by the exclusionary

> rule is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" Id., at 141.

In Belton, the Court adopted a rule that is fairly easy for the police to administer when the Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 101 S.Ct. at 2864 (footnotes omitted).

In a companion case to Belton, the Court in Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841 (1981), again attempted to draw lines that will be fairly easy for the police to follow. The Court held that the automobile exception to the fourth amendment warrant requirement allows the police to open the trunk of the vehicle, but does not justify the search of closed, opaque containers found in the trunk unless the distinctive configuration of the container proclaims its contents. 101 S.Ct. at 2846, 2847.

In Belton and Robbins, the Supreme Court was criticized for establishing "bright line" rules. See Justice Powell, concurring in Robbins, 101 S.Ct. at 2847; and Justice Brennan, dissenting in Belton, 101 S.Ct. at 2866. But despite this criticism, these cases point out the importance of applying the exceptions to the fourth amendment warrant requirement on a categorical basis. The exceptions must be stated and applied in such a way that the policeman, faced with the need to make instantaneous decisions in the field, can correctly decide what action to take.

In terms of the instant case, the policeman faces a difficult enough task applying the categorical test. He must determine whether he has probable cause and whether exigent circumstances exist. However, that task has been simplified by the body of law already created. He has learned pretty well to recognize probable cause. As to exigent circumstances, the police officer must determine whether there is hot pursuit, a danger to others or a threat of destruction of evidence or of flight by the suspect. These are fairly objective criteria susceptible to yes or no answers.

However, the court of appeals has thrown in a new factor that greatly increases the difficulty of assessing the fourth amendment requirement. The court of appeals has required the policeman -- at the risk of violating the defendant's fourth amendment rights -- to consider a

balancing test in each case based on the severity of the crime and the harm done by the crime. In terms of the court of appeals' analysis in this case, how serious would the crime have to be to validate the warrantless entry? Must there be personal injury; or will property damage suffice to tip the balance in favor of immediate police action?

This question was answered by the Supreme Court in Dunaway, Belton and Robbins. The Supreme Court does not require the policeman to engage in such an intricate balancing act. The exceptions to the fourth amendment requirement are categorical rules created after balancing tests considered general policies, not the facts of specific cases. As noted by Justice White, in a concurring opinion in Dunaway, 442 U.S. at 219-20:

> As our prior cases hold, however, the key principle of the fourth amendment is reasonableness--the balancing of competing interests. . . . But if courts and law enforcement officials are to have workable rules, . . ., this balancing must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers. [Citations omitted.]

In the instant case, the proper test to determine whether the arrest was valid considers whether the police had probable cause to believe that defendant had committed a crime and whether exigent circumstances existed, that is, whether there was hot pursuit, a danger to others, or a threat of destruction of evidence or a threat of flight by

the suspect. Here, the police had probable cause and the threat of destruction of evidence by the alcohol metabolizing in the blood before the breathalyzer could be administered if time were taken to obtain a warrant.

The state contends that this categorical application of the warrant exception applies whether the suspected crime is a misdemeanor or a felony.

C. The fourth amendment does not draw a distinction between felonies and misdemeanors.

The court of appeals' opinion in this case implies the state must show different or more exigent circumstances to justify a warrantless, nonconsensual entry to make a misdemeanor arrest than to make a felony arrest.

The state believes this is incorrect. The same showing is required to justify the warrantless misdemeanor arrest as to justify a warrantless felony arrest.

The authority for a law enforcement officer to make an arrest is defined by sec. 968.07, Stats., which provides, in part:

> Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:
>
> (a) He has a warrant commanding that such person be arrested; or
>
> (b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or
>
> (c) He believes, on reasonable grounds, that a felony warrant for the

person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

Under sec. 968.07(1)(d), Stats., an officer may arrest a suspect on the basis of probable cause that the suspect has committed a crime. This applies to a misdemeanor as well as to a felony. The note to sec. 968.07, Stats., states that: "Sub. (1) increases the power of a law enforcement officer to arrest for all crimes when he has reasonable grounds to believe that a person has committed a crime." See ch. 255, sec. 63, Laws of 1969, and 42 Wis. Stats. Annot. at 35-36 (1971). The statute's reference to crimes includes misdemeanors as well as felonies. See Rickards v. State, 77 A.2d 199, 202 (Del. 1950).

Under sec. 968.07(1), Stats., the police officer can arrest a suspect for a misdemeanor if he has probable cause to believe the suspect committed the crime. The statute has eliminated the common law requirement that the misdemeanor be committed in the officer's presence to justify a warrantless arrest.

This court has ruled that within the limits of the fourteenth amendment, the law of Wisconsin determines the validity of a warrantless arrest. State v. Estrada, 63 Wis. 2d 476, 494, 217 N.W.2d 359 (1974).

Under sec. 968.07(1), Stats., a warrantless arrest for a misdemeanor is valid under the same

circumstances as a warrantless arrest for felony, that is, when the officer possesses probable cause. Therefore, unless the fourth amendment requires otherwise, in Wisconsin the arrest law for a misdemeanor is the same as for felonies.

Under the fourth amendment, the only limit on warrantless arrest is the same for misdemeanors as for felonies, that is, the police must possess probable cause. See 2 LaFave, Search and Seizure, sec. 5.1 at 231-32 and cases cited therein.

In a leading case on the application of the fourth amendment in misdemeanor cases, the court said in Street v. Surdyka, 492 F.2d 368, 371-72 (4th Cir. 1974):

> The constitutional restrictions on arrest are derived from the fourth amendment's prohibition of unreasonable seizures. Because the Supreme Court has interpreted the fourth amendment in light of the law that existed when the Bill of Rights was adopted, . . ., it might be argued that the fourth amendment incorporates the common law's restrictions on warrantless arrests for misdemeanors. But the Supreme Court has never given constitutional force to this element of the common law rule. In Bad Elk v. United States, 177 U.S. 529, 20 S.Ct. 729, 44 L. Ed. 874 (1900), the Court applied the common law rule but hinted that its restrictions could be relaxed by statute. Subsequent cases have focused entirely on the requirement of probable cause. . . . We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence. The difference between felonies and misdemeanors, is no longer as significant as it was at common law.

> . . . Maryland courts have criticized the continued use of the common law rule as impractical and illogical and have invited the state legislature to adopt new rules. . . . Classifications based on other criteria could be both rational and practical. . . . We are most reluctant to adopt a constitutional interpretation that would impede reform in this area. The fourth amendment protects individuals from unfounded arrest by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

(Footnotes and citations omitted.)

Other appellate courts have also ruled that the fourth amendment does not distinguish between felony and misdemeanor arrests. See Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); In the Matter of Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); and State v. Berker, 391 A.2d 107 (1978).

In City of Columbus v. Harrell, 18 Ohio App. 2d 149, 247 N.E.2d 770, 773 (1969), the court ruled that the state did not violate the fourth amendment when it authorized a police officer to arrest for a misdemeanor not committed in his presence. The court held the fourth amendment requires probable cause for arrest and no more for either a misdemeanor or a felony.

Therefore, in the instant case, the fourth amendment places no greater burden on the state to justify a warrantless arrest of a suspect in his home for a misdemeanor than it does for a warrantless in-home arrest

for a felony. In each case, the policeman needs probable cause and exigent circumstances. The gravity of the crime should not be considered unless it is relevant to establish a recognized exigent circumstance, such as a threat to others when the suspect is believed to have committed a violent crime.

The court of appeals did not take this approach. The court of appeals considered the gravity of the offense as an extra factor in assessing the validity of the arrest. This is incorrect for several reasons.

First, the fourth amendment requirements for misdemeanor arrest are the same as for felony arrests.

Second, the statutory requirements for warrantless arrests for a crime believed to have been committed in Wisconsin are the same for misdemeanors as for felonies.

Third, the court of appeals' approach places too great a burden on the policeman who is required to make instantaneous decisions. As noted by the United States Supreme Court in Dunaway and Belton, rules are needed that can be applied by the police with reasonable certainty. Requiring the police to weigh the relative weight of the specific crime and harm caused in order to determine whether a warrantless entry is valid is too great a burden. It is difficult enough for the officer to assess probable cause and exigent circumstances; but that can be

done on a categorical basis that provides adequate protection to the suspect.

Fourth, before the circumstances qualify as exigent, they must show either a danger to others or a threat to the loss of evidence or a threat of flight by the suspect. The warrant requirement is relieved in those situations because of the possible severe consequences of taking the time to secure the warrant. If the court of appeals approach were adopted, it would mean that in some cases -- probably in most misdemeanor cases -- the courts would be saying that threats to others or possible loss of evidence or the possible flight of the suspect would be acceptable risks and that the warrant requirement is a higher value. This means that the drunken driver would be wise to rush home because as long as he has not caused any injury or damage, the police must get a warrant before he can be arrested. This would frequently mean the state's case would be irretrievably lost because the alcohol content in the blood would have dissipated by the time a warrant was obtained.

The state believes this is unnecessary. The circumstances generally recognized as exigent -- i.e., hot pursuit, threat of injury, threat of the destruction of evidence or of the flight of the suspect -- are strict enough that the suspect is sufficiently protected by requiring the state show those circumstances to justify the warrantless entry, without also requiring the state to show

that the suspected crime was serious and that it caused injury or damage. Such a showing is not required by the fourth amendment and should not be required by this court.

D. In this case, the police possessed probable cause and exigent circumstances to justify the warrantless entry to arrest the defendant.

As argued by the state, and as established in Payton and Laasch, the warrantless entry to arrest is valid where the police have probable cause to believe the defendant has committed a crime and the circumstances are exigent. Both those tests have been met in this case.

The circumstances were exigent because the police faced the risk of the loss of evidence if they went to obtain a warrant. The police had to arrest the defendant in order to perform the breathalyzer test before the blood metabolized the alcohol. The risk of losing that evidence created the exigent circumstance. See Schmerber and Bentley.

The police had probable cause to believe that the defendant had committed the crime of operating a motor vehicle while under the influence of an intoxicant.

The test for probable cause was stated in Estrada, 63 Wis. 2d at 496:

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing an offense has been committed. . . . Probable cause to arrest refers to that quantum of

> evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

(Citations and footnotes omitted.)

In the instant case, Officer Daley had received information from the witness, Randy Jablonic (13:27). Jablonic pointed out the car that the defendant had been driving and Daley checked the license and found that the car was registered to Welsh (13:28). Jablonic pointed out to Daley that the defendant had gone in the direction of the defendant's address (13:29). The defendant's home was one and one-half minutes away from where the defendant had left his auto (13:30). Jablonic told Daley that the defendant was obviously intoxicated and had been driving (13:30). Daley had previously visited the defendant's home to check out an alcohol-related disturbance (13:30-31).

The state submits that these facts show that Officer Daley had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Therefore, both the probable cause and exigent circumstances tests were satisfied to justify the warrantless entry of the defendant's home to arrest him.

CONCLUSION

The state requests this court to reverse the decision of the court of appeals and to affirm the order of the circuit court.

Respectfully submitted,

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 26 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-1686

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing, defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and that "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when

the police arrived and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view, the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. ___ (decided April 21, 1981); Payton v. New

York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976), when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the

fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled to special dignity and sanctity." Laasch v. State, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis.2d 860, 286 N.W.2d 153 (Ct.App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court

whether the officers entered the defendant's home with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

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[1] Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for findings on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

September 16, 1981 – Introduced by Representative RUTKOWSKI; cosponsored by Senator ADELMAN, by request of Judicial Council. Referred to Committee on Judiciary.

AN ACT to amend 59.47 (7), 752.31 (2) (c) and (d) and 808.04 (2) (a); and to create 752.31 (2) (q) of the statutes, relating to proceedings before the court of appeals.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the judicial council. For further information, see the state and local fiscal estimate which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 59.47 (7) of the statutes is amended to read:

59.47 (7) Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court. The district attorney of the county in which the case was filed shall represent the state in any appeal or other proceeding regarding that case which is heard decided by a single court of appeals judge, as specified in s. 752.31 (3).

NOTE: Subsection (7) is amended to clarify that the district attorney represents the state in appeals or other proceedings which are decided by a single court of appeals judge under s. 752.31. Subsection (7) is also amended to

clarify that under s. 752.31 a case is decided by a single court of appeals judge rather than heard. Some single-judge appeals or other proceedings are not heard, as oral argument may not take place in the case. The amendments to the statute are intended to harmonize the statute with the changes made to s. 752.31 by chapter 192, laws of 1979.

SECTION 2. 752.31 (2) (c) and (d) of the statutes are amended to read:

752.31 (2) (c) Cases involving violations of traffic regulations, as defined in s. 345.20 (1) (a), and cases under s. 343.305.

(d) Cases under ch~ chs. 51 and 55.

SECTION 3. 752.31 (2) (g) of the statutes is created to read:

752.31 (2) (g) Cases involving civil forfeitures.

NOTE: Subsection (2) is amended to provide that cases under ch. 55, like cases under ch. 51, are decided as specified in sub. (3) and to clarify that cases under s. 343.305 are also decided as specified in sub. (3). Cases under ch. 55 and forfeitures are to be decided in the same manner as the other types of cases specified in sub. (2).

SECTION 4. 808.04 (2) (a) of the statutes is amended to read:

808.04 (2) (a) Subsection (1) does not apply to an appeal for which a specific time period for initiating an appeal is expressly provided by law. Appeals for which special time periods are provided include: s. 9.10 (4) (a) (recall), 30.30 (3) (c) (harbor improvements), 32.05 (13) (condemnation), 32.06 (13) (condemnation), 48.911 (adoption proceedings), 62.075 (4) (detachment of farm lands), 66.014 (7) (b) (municipal incorporation), 66.021 (10) (b) (annexation), 66.05 (8) (c) (razing buildings), 66.435 (4) (b) (urban renewal), 87.16 (flood control projects), 88.09 (2) (drainage of lands), 102.25 (1) (worker's compensation), 111.07 (7) (employment relations commission), 117.03 (5) (school district reorganization), 128.15 (1) (objections to creditors' claims), 128.20 (2) (settlement of receiver's or assignee's accounts), 182.60 (10) (b) (special economic improvement districts), 186.29 (5)

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NOTE: Subsection (2) (a) is amended to correct the erroneous reference to s. 808.07 (6) for eviction actions. Eviction actions are governed by s. 808.07 (7).

(End)

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, THAT VACATED AND REMANDED THE ORDER OF THE CIRCUIT COURT FOR DANE COUNTY THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
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THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES

1. Should an appeal from an order under s. 343.305, Stats., to suspend a defendant's operating privileges for failure to submit to a breathalyzer test be decided by a panel of three court of appeals' judges or one court of appeals' judge?

This appeal was decided by one court of appeals' judge.

2. Did the police have probable cause to arrest the defendant for the commission of a crime?

This issue was not decided by the court of appeals' judge.

3. Did the facts present exigent circumstances so that the warrantless arrest of the defendant in his home for operating a motor vehicle while under the influence of intoxicants was valid under the fourth amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution?

Trial court answered: yes.

Court of appeals answered: no, because the case did not present exigent circumstances.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant does not believe that the oral argument would be helpful because the issue of lack of probable cause is so obvious that the other issues, although of great interest, are nonetheless moot. The defendant believes, however, that the publication is warranted in order to provide a statement on correct application of fourth amendment law to operating a motor vehicle while intoxicated.

STATEMENT OF THE CASE

The defendant-appellant agrees with the statement of the plaintiff-respondent-petitioner.

FACTUAL STATEMENT

The defendant-appellant has no additional facts to present on this review.

ARGUMENT

I. THE ISSUE OF WHETHER OR NOT THE APPEAL SHOULD HAVE BEEN HEARD BY A PANEL OF THREE JUDGES IN THE COURT OF APPEALS DOES NOT MEET THE CRITERIA ESTABLISHED BY THE COURT IN GRANTING A REVIEW TO PETITION TO APPEAL.

The supreme court in its Per Curiam Opinion set forth the following criteria in determining whether or not to grant a petition to appeal, to wit:

> "A) A real and significant question of federal or state constitutional law is presented.
>
> "B) The petition demonstrates a need for this court to consider establishing, implementing or changing a policy within this court's authority.
>
> "C) A decision by this court will help develop, clarify or harmonize the law and
>
> > 1) The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> >
> > 2) The question presented is a novel one, the resolution of which will have state-wide impact; or
> >
> > 3) The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this court.
>
> "D) The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or this court or other Court of Appeals' decisions.
>
> "E) The Court of Appeals' decision is in accord with opinions of this court or the Court of Appeals but due to the passage of time or changing circumstances, such opinions are ripe for re-examination."

November 15, 1978, 85 Wis. 2d XII, 268 N.W. 2d XXVIII. This issue raised by the state does not fall into any of the above criteria.

As argued by the state, s. 752.31, Stats., provides, in part:

> "(1) Except as otherwise provided in this section, the court of appeals shall sit in panels of three judges to dispose of cases on their merits.
>
> "(2) Appeals to or other proceedings in the court of appeals in the following types of cases shall be decided as specified in sub. (3):

* * *

(b) Municipal ordinance violation cases.

(c) Cases involving violations of traffic regulations, as defined in s. 345.20 (1) (a).

* * *

(f) Misdemeanors."

Section 343.305(7), Stats., (1975) provides for the testing of one's blood, breath or urine for the purpose of determining intoxication as it relates to operating a motor vehicle in violation of a municipal ordinance, traffic regulation or a misdemeanor, such as the traffic crime of operating a motor vehicle while intoxicated after a prior conviction of the same offense.

Section 346.65(2), Stats., provides as follows:

"Any person violating s. 346.63 (1) may be required to forfeit not more than $200.00 for the first offense and, upon the 2nd or subsequent conviction within 5 years, shall be imprisoned not less than 5 days nor more than one year and in addition may be fined not more than $500.00."

A first violation of s. 346.63, Stats., which prohibits operation of a motor vehicle while under the influence, is not a criminal act. State v. Albright, (App. 1980), 298 N.W. 2d 196, 98 Wis. 2d 663. Because of the penalty provision, however, a second violation of s. 346.63, Stats., is a criminal act.

Section 939.12, Stats., (1975) defines "crime" as:

"A crime is conduct which is prohibited by state law and and punishable by fine or imprisonment or both. Conduct punishable by a forfeiture is not a crime."

Section 939.60, Stats., (1975) provides as follows:

"A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

It is clear, therefore, from the foregoing it was the legislative intent to provide the state with the mechanism of gathering evidence to prove a violation involving operating a motor vehicle in municipal ordinances, traffic regulations and traffic crimes classified as misdemeanors. It was also the intent of the legislature in reorganizing the court system to provide a swift appellate procedure for the disposition of these relatively minor cases by splitting up the cases to be heard by one judge instead of three judges. The state has not demonstrated any profound need to override the obvious intent of this innovative legislative action.

II. AT THE TIME OF THE WARRANTLESS ARREST OF THE DEFENDANT IN HIS HOME, THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAD COMMITTED A CRIME.

The defendant-appellant concurs with the petitioner's argument on Pages 24 and 25 of its brief that in Wisconsin law enforcement officers may arrest a suspect on the basis of probable cause that the suspect has committed a felony or misdemeanor. The defendant-appellant also concurs with the following argument on Page 15 of the petitioner's brief:

> "The basic rule in regard to arrest in a suspect's home is that, in the absence of an arrest warrant and in the absence of consent to enter, the police need probable cause to believe the suspect committed the crime and exigent circumstances in order to make a constitutionally valid arrest. Payton v. New York, 445 U.S. 573 (1980), and Laasch v. State, 84 Wis. 2d 587, 591-93, 267 N.W. 2d 278, 281-82 (1978)."

Section 346.63, Stats., provides, in part, as follows:

"(1) It is unlawful for any of the following to drive or operate a motor vehicle:

(a) A person who is under the influence of an intoxicant or controlled substance;"

As previously argued, the first offense of s. 346.63, Stats., is not a criminal act. State v. Albright, (App. 1980), 298 N.W. 2d 196, 98 Wis. 2d 663. It is only when an operator subsequently violates the statute that he becomes a criminal offender.

Therefore, upon the foregoing authority, before the officers could have constitutionally invaded the home of the defendant-appellant they must have had probable cause to believe that the defendant-appellant had been previously convicted of operating a motor vehicle while intoxicated. The record is clear that this essential fact was not known to the arresting officers prior to the warrantless arrest.

Both at the time of trial and during the appeal, the state argued that as long as the officers merely had a reasonable belief that the defendant had operated a motor vehicle in violation of s. 346.63 (1) was sufficient probable cause to believe that a crime was committed thereby justifying a warrantless arrest. (Def.-App. App. 101-103).

It is evident from the record that the police had no idea that the defendant had ever been charged much less convicted of a prior violation of operating a motor vehicle while intoxicated. At best, as admitted in the state's brief, all the officers knew was that the defendant had apparently violated s. 346.63, Stats., which, if it were his first offense, would only subject him to a non-criminal penalty of a forfeiture.

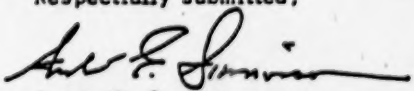
III. THE OPINION OF THE APPELLATE COURT DATED AND RELEASED MAY 26, 1981, IS CORRECT AND FOUNDED UPON GOOD LAW.

The defendant believes that the decision of the appellate court was correct and founded upon good, sensible law. Accordingly, the defendant refers to said decision in support of this argument.

CONCLUSION

Since the record conclusively shows that the arresting officers did not have probable cause to believe a crime had been committed prior to invading the defendant's home and perfecting a warrantless arrest, this case must be remanded to the trial court for purposes of dismissal.

Respectfully submitted,



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A. ARREST BASED ON PROBABLE CAUSE

Wisconsin Statute Section 968.07(1)(d) authorizes police officers to make arrests without arrest warrants. It provides that a law enforcement officer may arrest a person when there are reasonable grounds to believe that person is committing or has committed a crime. In the present case, the defendant was arrested by Officer Daley and charged with violating Section 346.63(1) of the Wisconsin Statutes, Operating a Motor Vehicle While Under the Influence of An Intoxicant or Controlled Substance. There are two elements to that crime.

1) The defendant must have been operating a motor vehicle on a highway in the State of Wisconsin; and

2) The defendant while operating his vehicle must have been under the influence of an intoxicant or controlled substance.

Therefore, the question before the trial court in the present case was whether or not Officer Daley had probable cause to believe that the defendant had violated Section 346.63(1) when he was arrested. The trial court held that he did. Respondent agrees. Probable cause was defined in Kluck v. State, 37 Wis. 2d 378, 155 N.W. 2d 26 (1977):

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing that an offense has been committed. It refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

In State v. Paszek, 50 Wis. 2d 619, 624-625, 184 N.W. 2d 836 (1971) the Court defined probable cause for an arrest as being:

"probable cause to arrest refers to that quantum of evidence which would lead a police officer to believe that the defendant probably committed a crime. Henry v. U.S, (1959), 361 U.S. 98. It is not necessary that the evidence giving use to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, Browne v. State, supra, and it is well established that the belief may be predicated in part upon hearsay information. Draper v. U.S,, 358 U.S. 307 (1959). The quantum of evidence which constitutes probable cause to arrest must be measured by the facts of a particular case. Wong Sun v. U.S, (1963) 371 U.S. 471." (emphasis added)

The Respondent believes that the facts and information that Officer Daley possessed at the time he arrested the defendant were sufficient enough to warrant a prudent man in believing the defendant had probably been operating his automobile in violation of Section 346.63(1). Shortly before arresting defendant, Randy Jablonic gave Officer Daley the following information:

1) Defendant was operating his motor vehicle on a highway in the State of Wisconsin;

2) Defendant was operating his motor vehicle in a very erratic manner, and nearly caused a serious traffic accident;

3) Defendant left his motor vehicle in the cemetery;

4) Defendant staggered when he walked and was very unsteady;

5) Defendant's speech was very slurred;

6) Defendant had just left the area, heading in the direction of Tree Lane;

7) Defendant's physical description; and

8) His belief that defendant was possibly under the influence of an intoxicant or controlled substance.

There can be no question that Jablonic's information, if reliable, meets the probable cause standard set in Paszek, supra. The trial court viewed Jablonic's hearsay information as being credible, as the Court concluded that Jablonic was a citizen informant. In Paszek, information given to the police by a citizen informant, which demonstrated that the informant was in a position to see what he claims he saw, was enough to establish its reliability.

STATE OF WISCONSIN

IN SUPREME COURT

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ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
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THE HONORABLE MARK A. FRANKEL, PRESIDING

REPLY BRIEF OF PETITIONER

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1/7/81

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STATE OF WISCONSIN

IN SUPREME COURT

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REPLY BRIEF OF PETITIONER

INTRODUCTION

In the reply brief the state will address the defendant's argument that the arresting officers lacked probable cause on the ground that there is no evidence in the record showing that at the time the arrest was made the officers knew that the defendant had been previously convicted of drunken driving. As to all other issues the state relies on its original brief and appendix.

I. THE DEFENDANT HAS WAIVED HIS RIGHT TO HAVE THIS COURT CONSIDER HIS CONTENTION THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST IF THEY WERE NOT AWARE OF A PREVIOUS CONVICTION OF THE DEFENDANT FOR VIOLATION OF SEC. 346.63(1), STATS.

In his responding brief in this court, the defendant has argued that the police entry into his home to arrest him was unlawful because at the time of the entry the police did not have probable cause to arrest him. The defendant contends the police lacked probable cause because the record does not show that at the time of the entry the police were aware that the defendant had been previously convicted for violating sec. 346.63, Stats. (See page 6 of defendant-appellant's brief.)

Pursuant to sec. 346.65(2), Stats. (1975), a violation of sec. 346.63(1), Stats., is not a misdemeanor unless the defendant was convicted of such a violation within the previous five years.

This is the first time the defendant has raised this issue. The defendant did not challenge probable cause on this ground in either the trial court or the court of appeals.

At the hearing on July 14, 1980, where the court considered the validity of the arrest, the issue was whether the police could justify the entry into the house on the basis of consent, hot pursuit or exigent circumstances (14:5-13, 24-35). The defendant did not

challenge the trial court's finding that the police had probable cause to make the arrest (14:35). At no time during the hearing did the defendant argue that, in order to have probable cause to make the arrest, the police had to know that the defendant had been previously convicted of drunken driving. At one point during the hearing the defendant's attorney agreed with the trial court that the question was whether there was hot pursuit, exigent circumstances and consent in order to justify the warrantless arrest in the home (14:11).

Also, in his original brief and his reply brief in the court of appeals, the defendant did not challenge the trial court's finding of probable cause. In his original brief in the court of appeals the issue argued by the defendant was whether the police could justify the warrantless entry into the home on the basis of hot pursuit or exigent circumstances (see pages 6-8 of the defendant's original brief in the court of appeals). At pages 7 and 8 of his original brief in the court of appeals the defendant concluded that in the absence of exigent circumstances and hot pursuit his arrest was unlawful and the trial court did not have personal jurisdiction over him.

At page 2 of his reply brief in the court of appeals the defendant stated: "The only dispositive issue here is whether exigent circumstances justified the warrantless arrest of appellant by the police inside the privacy of his home." The defendant added that, if such

circumstances did not exist, his arrest was unlawful and the trial court did not have jurisdiction to hold a reasonableness hearing. Also at page 2 of his reply brief the defendant admitted that the police had probable cause to investigate whether he had been operating a motor vehicle while intoxicated; and the defendant argued that he was entitled to relief because there were no exigent circumstances to justify the warrantless entry into his home.

Because the defendant did not raise the probable cause issue in the trial court or in the court of appeals, he has waived it and the issue may not be raised as of right for the first time in the supreme court. See State v. Brown, 96 Wis. 2d 258, 263, 291 N.W.2d 538 (1980), and Lampkins v. State, 51 Wis. 2d 564, 570-71, 187 N.W.2d 164 (1971). Also see Neely v. State, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980), where the defendant was deemed to have waived an issue by his failure to raise it in the trial court or the court of appeals.

The defendant has raised the issue of probable cause in his challenge to the lawfulness of the arrest. The questions of the lawfulness of the arrest and probable cause to support the arrest go to the court's personal jurisdiction over the defendant. See Walberg v. State, 73 Wis. 2d 448, 457-58, 243 N.W.2d 190 (1976), and Lampkins, 51 Wis. 2d at 570. The issues of probable cause and lawfulness of the arrest are waived if not timely raised.

Walberg, 73 Wis. 2d at 458-60; and Lampkins, 51 Wis. 2d at 570-71. Therefore, because he failed to previously challenge the probable cause to support the arrest on the ground that the police were not aware of a previous drunken driving conviction, the defendant has waived that issue and is not entitled to have it reviewed as a matter of right in this court. Because the defendant has raised this issue for the first time in the supreme court after failing to raise it in the trial court and the court of appeals, this court should refuse to consider the merits of the claim. However, if the court does consider the merits, the state believes that the arresting officers had probable cause to make the arrest at the time they entered the defendant's home.

II. WHEN THEY ENTERED THE DEFENDANT'S HOME THE ARRESTING OFFICERS POSSESSED PROBABLE CAUSE TO ARREST THE DEFENDANT FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT.

Even if the arresting officers, at the time they entered the defendant's home, were not aware of a previous drunken driving conviction for the defendant, the officers possessed probable cause to arrest the defendant for operating a motor vehicle while under the influence of an intoxicant in violation of sec. 346.63(1)(a), Stats. (1975).

The police possess probable cause to make an arrest when they have enough information to lead a

reasonable officer to believe that guilt is more than a possibility." See State v. Cheers, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981), quoting from State v. Paszek, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971). In another portion of the quote from Paszek, this court said in Cheers that probable cause exists where the information within the officer's knowledge is sufficient to warrant a man of reasonable caution to believe that an offense has been committed. Cheers, 102 Wis. 2d at 387.

In this case, the police had probable cause to believe that the defendant had committed the offense of operating a motor vehicle while under the influence of an intoxicant in violation of sec. 346.63(1)(a), Stats. (1975). In order to convict the defendant for violating sec. 346.63(1), Stats., two elements must be proven: "(1) that the defendant was driving or operating a motor vehicle; and (2) that the defendant was under the influence of an intoxicant at the time that he was driving or operating the motor vehicle." State v. Burkman, 96 Wis. 2d 630, 644, 292 N.W.2d 641 (1980). Those elements are the same whether the defendant is charged civilly or with a misdemeanor. See secs. 346.63(1)(a) and 346.65(2), Stats. (1975).

As discussed at pages 30 and 31 of the state's brief-in-chief in this court, the police possessed sufficient information to show probable cause as to both elements of the charge. They had been informed that the

defendant was operating a vehicle and they had also been informed that the defendant was under the influence of an intoxicant. Therefore, the police possessed probable cause to believe that the defendant had committed an offense by violating sec. 346.63(1), Stats. (1975).

Whether the defendant was guilty of violating a traffic regulation or committing a misdemeanor, the police had the authority to arrest him without a warrant as long as they had reasonable grounds to believe that he had violated the law. Section 968.07(1)(d), Stats., authorizes the police to make a warrantless arrest for a misdemeanor or a felony as long as the officer possesses reasonable grounds to believe that the person committed a crime. Section 345.22, Stats., authorizes a traffic officer to arrest a person without a warrant for violation of a traffic regulation if the officer has reasonable grounds to believe that the person has violated a traffic regulation. A traffic regulation is a provision in chs. 341 to 349 for which the penalty for a violation is a forfeiture. See sec. 345.20(1)(a), Stats. Section 346.63(1), Stats. (1975), is considered a traffic regulation for the first conviction because the penalty is a forfeiture. See sec. 346.65(2), Stats. (1975).

Thus, the police had the authority to make a warrantless arrest of the defendant as long as they possessed probable cause to believe that he had committed a crime or violated a traffic regulation. In other words,

the police had the authority to make a warrantless arrest on the basis of probable cause whether the proposed charge was a crime or violation of a traffic regulation. In either case, the police possessed probable cause on each element of the charge; and therefore the police possessed probable cause to make the arrest. Because the police possessed probable cause to make the arrest, and because the police had the authority to make the arrest, and because exigent circumstances existed, the police were authorized to enter the defendant's home without a warrant to make the arrest. Therefore, whether at the time they entered the home the police were aware of a prior drunken driving conviction for the defendant is irrelevant to the question of whether the police possessed probable cause to make an arrest, since, even without the knowledge of a prior conviction, the police possessed sufficient information concerning the two elements of the charge in order to satisfy probable cause requirements.

CONCLUSION

For the reasons stated in this reply brief and for the reasons stated in its brief-in-chief, the state requests this court to reverse the decision of the court of appeals and to affirm the order of the circuit court.

Respectfully submitted,

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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal from an Order entered July 14, 1980, by the Honorable Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12.

APPELLANT'S BRIEF AND APPENDIX

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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal from an Order entered July 14, 1980, by the Honorable Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12.

APPELLANT'S BRIEF

ISSUE FOR REVIEW

Did the Trial Court have jurisdiction to hold a reasonableness hearing on the defendant's refusal to take a breathalyzer test where defendant was arrested without a warrant inside his home?

The Trial Court Answered: Yes.

ORAL ARGUMENT

The Appellant takes the position that oral argument would be an unnecessary burden on the time and resources of the Appellate Court.

PUBLICATION OF OPINION

The Appellant takes the position that the opinion should be published because this issue has not been previously decided by an Appellate Court and is of great importance to every Wisconsin citizen.

STATEMENT OF THE CASE

This is an action to suspend the operator's license of the defendant for 60 days pursuant to s. 343.305(7)(b), Stats. (1975). The defendant was arrested and criminally charged with operating a motor vehcile while intoxicated contrary to s. 343.63(1)(a), Stats. (1975), on April 24, 1978. He refused to submit to a breathalyzer test. This action commenced when the defendant was served with notice of intent to suspend operating privileges on April 27, 1978, for said refusal.

The defendant made his initial appearance by special appearance. He stood moot, whereupon, the Court entered a plea of not guilty. He then made a timely request for a hearing to determine the reasonableness of his refusal.

Prior to the reasonableness hearing, an evidentiary hearing was held on the defendant's motion attacking the Court's jurisdiction on July 14, 1980. Two issues were raised: (1) whether the police had probable cause to arrest the defendant and (2) the validity of the arrest. The

Court held the warrantless arrest valid on the grounds of "hot pursuit" and exigent circumstances. The Court also found that consent to the entry of defendant's home was not at issue. (R. 14-34-35, A.Ap.p. 115-116).

On September 5, 1980, a hearing was held to determine the reasonableness of the defendant's refusal. The primary issue raised was whether the defendant was under a valid arrest at the time he was requested to submit to a breathalyzer test pursuant to s. 343.305(2)(b)(1) and s. 343.305(7)(c), Stats. (1975). The Court ruled that it was bound by its prior holding as to the validity of the arrest, thus, finding the defendant's refusal unreasonable. (R. 10-39, A.Ap.p. 103-104). The Court then ordered the suspension of the defendant's operators license for 60 days. (R. 9-2, A.Ap.p. 101).

The defendant served his Notice of Appeal on September 15, 1980, and filed it on September 16, 1980.

FACTUAL STATEMENT

On or about April 24, 1978, at 8:30 p.m. the defendant was driving home on Mineral Point Road in the City of Madison, Dane County, Wisconsin. (R. 13-16, A.Ap.p. 109-110). It was raining and visibility was poor. The defendant strayed across the center line of the highway, and in order to avoid a head-on collision with an oncoming vehicle, he took evasive ation by swerving left off the highway and onto an open field. Since his vehicle was stuck in the mud, the defendant requested a ride

from Randy Jablonic who was parked on the side of the road after observing the incident. (R. 13-8 to 13-14, A.Ap.p. 104-109). When Jablonic refused, the defendant walked to his nearby residence at 7158 Tree Lane and went to bed before 9:00 p.m. (R. 10-18, A.Ap.p. 102-103).

At 8:49 p.m. the dispatcher for the Madison Police Department received a call reporting the incident. The police arrived at the scene a few minutes later, ran an identification check on the vehicle and took a statement from Jablonic. (R. 13-40 to 13-42, A.Ap.p. 112-115). Jablonic testified that he told the police he believed something was wrong with the defendant. He stated that he thought the defendant was either very sick or drunk, (R. 13-14, A.Ap.p. 109), but that he did not have the opportunity to smell intoxicants on the defendant's breath. (R.13-11, A.Ap.p. 106).

After this initial investigation, the police proceeded to the defendant's home. Police Officer Richard Daley testified that he arrived there eleven minutes after he received the call. (R. 10-13, A.Ap.p. 101-102). The defendant's wife, however, testified that the police arrived 30 to 45 minutes after her husband had come home. (R. 10-34, A.Ap.p. 103).

It is an undisputed fact that the police entered the defendant's home without consent and without a warrant. Police Office Daley testified that they proceeded to the bedroom where defendant was sleeping, entered the room and subsequently detected the odor of intoxicants. They ordered the defendant to get dressed, placed him under arrest and

issued him a citation. (R. 13-37-38, A.Ap.p. 110 - 112). The defendant was subsequently taken downtown to the Madison Police Department and offered a breathalyzer test which he refused. (R. 10-8, A.Ap.p. 101). This action was commenced September 15, 1980.

ARGUMENT

The Warrantless Arrest of the Defendant Inside his Home was Unconstitutional and Unlawful, Therefore, the Court did not Have Jurisdiction to Conduct a Hearing on the Reasonableness of Defendant's Refusal to Submit to a Breathalyzer Test.

The warrantless and unconsented entry by the police into the defendant's home to effect his arrest is prohibited by the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. This fundamental right to privacy is excepted by only a few judicially determined circumstances. "Absent exigent circumstances, the entry of one's dwelling without consent to effect a warrantless felony arrest on probable cause, is unlawful." Lasch v. State, 84 Wis. 2d 587, 596, 267 N.W. 2d 278 (1977).

In the present case, the entry of the defendant's dwelling without consent was to effect a warrantless arrest in a civil-type of special proceeding. It is highly doubtful whether the seriousness of this offense under any circumstance could justify such an intrusion into one's home by the State; especially where the police went to the defendant's home initially to only investigate the possibility of such an offense. The defendant's warrantless arrest in the privacy of his bedroom at home where

he had been sleeping is "police conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 209, 96 L. Ed. 183 (1952).

The test as to the reasonableness of a police invasion of privacy to investigate suspicious circumstances or conduct is whether the interests of the State outweigh the nature of the intrusion on the privacy of the individual. Although the police have the right to engage in legitimate and restrained investigative conduct based on ample factual justification, such justification falls short of that required to support an arrest. Bies v. State, 76 Wis. 2d 457, 465, 251 N.W. 2d 461 (1976); Terry v. Ohio, 392 U.S.1, 15, 81S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The police in this case only had probable cause to investigate the possibility that the defendant was driving while intoxicated. The witness Jablonic never had an opportunity to smell intoxicants on the defendant's breath. He even suggested that the defendant may have been sick. Yet, based upon this evidence, the Trial Court held that the police had probable cause to arrest the defendant in his home without a warrant on grounds of "hot pursuit" and exigent circumstances. R. 14-35, A.Ap.p. 115 - 116).

The Court's finding of "hot pursuit", however, is not supported by the facts. The police pursued the defendant merely on the subjective observations of Jablonic, not after observing the defendant commit the

offense and then fleeing to the safety of his home. The police never had the necessary eye contact of physically observing the defendant committing the offense to justify their warrantless arrest of him inside his home on grounds of "hot pursuit." Carson v. Pape, 15 Wis. 2d 300, 302, 308, 112 N.W. 2d 693 (1961). (R. 13-42, A.Ap.p. 114-115).

The Court's finding of exigent circumstances is also unsupported by the facts. Such circumstances exist when swift action is required to prevent imminent danger to life or property, or to prevent the escape of a suspect or the destruction of evidence. Laasch v. State, supra, 84 Wis. 2d at 592. In this instance, the defendant was not going to escape or present any imminent danger to life or property since he was at home and in bed asleep.

The Court predicted its exigent circumstance finding primarily on destruction of evidence grounds. (R. 14-35, A.Ap.p. 115-116). Apparently the Trial Court relied on State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W. 2d 153 (1973) which held that "blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation."

In Bentley, the Court concluded that the police had probable cause to arrest the defendant since they detected the odor of alcohol on his breath, and he was responsible for an accident which killed two people and seriously injured three others. Based on such probable cause and the exigency of blood rapidly metabolizing alcohol, the Court held that the police did not need a warrant to request the defendant to submit

to a blood test.

The exigent circumstances of Bentley are not present in this case because the police did not discover any evidence of alcohol on the defendant's breath until after they were unlawfully in his home. The police in Bentley had some knowledge of such evidence before they had any need to act quickly to preserve it. The police here did not have this knowledge before they entered the defendant's home. Arguably, if the police had not detected the odor of alcohol on the defendant's breath while unlawfully in his home, they would not have charged him with operating a motor vehicle while intoxicated. Under these circumstances, the State's interest in this incident hardly outweighs such an intrusion upon the privacy of the defendant. Bies v. State, supra, 76 Wis. 2d at 467.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibits such an intrusion upon the privacy of the defendant. Without a warrant and without consent, the police were prohibited from proceeding through the door of the defendant's home and up to his bedroom to continue their investigation. The unlawful entry, therefore, destroys the validity of the subsequent arrest which obviates any exigent circumstance that may have justified such a warrantless in-house arrest. Absent exigent circumstances, the unlawful arrest of the defendant precluded the Trial Court from personal jurisdiction over him.

Without personal jurisdiction, the Trial Court could not suspend the operator's license of the defendant on the basis of a hearing held to determine the reasonableness of his refusal to submit to a breathalyzer test. "Revocation cannot occur without a hearing, a hearing cannot occur without a citation and a citation cannot occur without an arrest." That arrest must be lawful. 67 Op. Att'y. Gen. 314 (1978). The Trial Court, therefore, did not have jurisdiction over the defendant to conduct a reasonableness hearing or suspend his license for 60 days.

CONCLUSION

The order suspending the operator's license of the Appellant for 60 days should be reversed and his operating privileges reinstated.

Respectfully Submitted,

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APPELLANT'S APPENDIX

9-2 DOCKET ENTRY DATED SEPTEMBER 5, 1980

(Formal Parts Omitted)

Court finds refusal to be unreasonable. Wisconsin Drivers License suspended for 60 days. Court ordered a stay of 14 days in which to file Notice of Appeal.

10-8 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. And then the question was put, "Will you submit to a chemical test of your breath?".

Q. And did Mr. Welsh answer that question for you?

A. Yes.

Q. What did he say?

A. No.

10-13 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

CROSS EXAMINATION BY ATTORNEY SIMONSON

A. I would have to refresh my recollection from the court--I know it was approximately eleven minutes.

Q. All right. The eleven-minute span we're talking about, that's from the time you arrived at the scene and talked to a witness and then proceeded down to

my client's residence?

A. No.

Q. The eleven-minute span was between the time of the incident and your arrival at his house?

A. Yes.

10-18 PARTIAL TESTIMONY OF EDWARD WELSH:

DIRECT EXAMINATION BY ATTORNEY SIMONSON

Q. And, tell us what you did when you came home.

A. Came home, came in, went to the hallway, hung up my coat, went upstairs and met my wife. She was upstairs and I went up and took my clothes off and put them in the bathroom and got into bed. I had a pint of Canadian Club in there and I took a couple of good drinks of it and got into bed and started to go to sleep. It was cold out.

Q. But you were out that evening?

A. Right.

Q. Did you, in fact, sleep or doze?

A. I started to, yes.

Q. Then what happened?

A. I was woke up by three officers standing in my bedroom, in the doorway of the bedroom, you know.

Q. Did you have any clothes on?

A. No, I was under the blankets.

10-34 PARTIAL TESTIMONY OF PATRICIA WELSH:

DIRECT EXAMINATION BY ATTORNEY SIMONSON

Q. Do you remember when Mr. Welsh arrived home?

A. Not the exact time.

Q. But you remember when he came home?

A. Yes.

Q. You also recall that sometime thereafter the police officers arrived?

A. Yes.

Q. All right. And do you recall how long a period of time elapsed between the time your husband came home and the officers arrived?

A. Half-hour to forty-five minutes.

Q. And the last time you testified--I forgot what you said, but you said either ten minutes, a few minutes, or forty-five minutes, something like that?

A. I think I said a half-hour or forty-five minutes

10-39 PARTIAL TRANSCRIPT OF THE COURT'S FINDING BY JUDGE FRANKEL

THE COURT: I think if I were incorrect in my

view of the law I would concede, in all likelihood, Mr. Simonson's point that the officers may not gather evidence or they may not pursue action against the defendant if it was a direct consequence of an unlawful arrest, but, as I indicated earlier, the Court is bound by its earlier ruling that that was a valid arrest. And, I think Mr. Simonson certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge.

13-8 PARTIAL TESTIMONY OF RANDY JABLONIC:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. Well, I had just driven under the West Beltline and a car had pulled out in front of me. I don't recall if it had come over the ramp or one of the first streets. It was raining and wet. Visibility was bad, and I first took the assumption that I was following a very elderly person that was driving extremely cautiously, very, very slow, and then a little faster. As it proceeded east then it began--the car began to go from

13-9 one side of the road to the other. And I began to be

very much aware that the person, obviously, did not have good control of the vehicle that they were driving. And as we approached the boulevard section near the West Towne area where the road divided, the car was headed right directly at the median where there is a sign or arrow posted that you should stay to the right. And I thought that the car--it wasn't travelling at an excessive rate of speed. But it was weaving back and forth. And it appeared to me they were going to take the signpost right off. I don't recall that they did. But they did then veer to the left lane and go down the left lane quite suddenly. There is another car coming from the east, going west, and I thought there might be a head-on collision. And then at the last moment the car that I had been following veered left and drove right into that cemetary or open field there and proceeded to stall out there or get stuck because it was wet.

Q. Did you stop your vehicle?

A. You know, there wasn't anything--I stayed a great distance behind--not a great distance, but a safe distance behind, because I didn't want to be involved.

I realize this driver was very erratic. And as soon as he had driven off into the field I thought the person

13-10 was either sick or very much something wrong. So, I drove to the next intersection, which was just a few hundred feet. I made a U-turn there and pulled up behind because I didn't want that car to come back out on the road. Because I realize they would probably kill somebody. And I immediately stopped the lady or the person who had been forced to stop by this car, and asked them to go call the police--to get some help so that we could prevent this person from getting back out on the road.

13-11 Q. And did you--did this person get close enough to you that you could observe his breath?

A. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell the breath.

Q. What about his speech? Was anything unusual about his speech pattern?

A. Well, the person--he stood there quite some time--what seemed like a long time for a person that had approached the vehicle, and then asked if I would

give him a ride home. And that was a very--appeared to be a very controlled conversation--"wouldn't you please give me a ride home"--or something of that nature. And then I said no, that we better wait to get some help to get the car out. And then the person broke into a very slurred conversation--"you wouldn't get your cops"--or something--it was a very insecure and not very controlled conversation. I was very--they were very much concerned that I would call the cops, and they were accusing that I was going to call the cops. I said, "Well, I have sent the lady to get help." I didn't want the person to leave. And I thought it was important that we keep him there by the vehicle.

Q. What did that person do after you informed him that the police were--

A. Well, for a moment he left, and then came back and asked again if I wouldn't please give him a ride home. And I said, "No," that I wouldn't and then he left. And I watched for a while. He was going back--going north on that road. And then I thought that they swerved to the east, but, you know, it was

dark and raining, and I was more interested in waiting for an officer to arrive. And I, at the same time, wanted to keep an eye on the car.

Q. Would you recognize that individual if you see him again?

13-13 A. I would say it is the gentleman sitting over here with the orange shirt. (indicating)

MR. STEWART: Would the record please reflect he has identified the defendant.

THE COURT: It may.

Q. Now, approximately--or can you approximate how much time elapsed between the time that you made conversation or had conversation with the defendant? Well, let me put it this way; did a police officer arrive on the scene?

A. Yes, sir.

Q. How much time elapsed between the time the police officer--his coming on the scene and the defendant departing the scene?

A. I really couldn't say how much time. If I were to say shortly thereafter it may be something like three minutes --five mintes. You know, when you are waiting time

can seem to be a long time. And yet it wasn't--I would have to say just in plain terms, very shortly thereafter. And then as soon as the officer came over to there, I immediately went up and spoke to the officer and told him what had happened and that--

Q. What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

13-14 A. I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

13-16 PARTIAL TESTIMONY OF RANDY JABLONIC:

CROSS EXAMINATION BY ATTORNEY SIMONSON

Q. Actually, you do not recall the time that this incident occurred, do you?

A. In the back of my mind I remember thinking that--I told my wife something--I was going to be home. And I was trying to get home to the family, and I would have thought it was after--you know, it was dark. And it was raining. And it was later than I

had wanted to get home. And I don't recall if we mentioned a time here, but it seemed to me it was 8:30, or something like that--9:00. I don't specifically recall right here now.

Q. It could have been right around 8:30 or 8:00? Between 8:00 and 8:30?

A. If that is your pleasure. I don't recall distinctly the exact time that it occurred.

13-37 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. Well, what we saw on the way upstairs was wet and muddy tracks going, you know, to the bedroom. And arriving to the bedroom, that she showed us, we observed Mr. Welsh lying in bed with no clothes on, and muddy pants immediately next to the bed.

Q. All right, and what did you say, if anything, to Mr. Welsh?

A. We asked him to get up and put on his pants, and that we wanted to speak to him.

Q. Did he get up?

A. Yes, he did.

Q. And did he put his pants on?

A. Yes.

Q. And what happened after that?

A. In speaking with him we could notice the whole room smelled of alcohol. He had a very heavy odor of alcohol about his person. In speaking to him, his speech was very slurred, and so forth. And we had asked both the wife and stepdaughter, earlier, had he had anything to drink upon entering the home, and so forth. And they had told us no. We asked him if he had anything to drink, and he said, "No."

Q. Now, are you familiar with the breathalyzer machines?

13-38 A. Yes, I am. Not an operator.

Q. I know that. You understand that--you are trained, when you make an arrest for operating under the influence, that you should get that person downtown as soon as possible?

A. Yes.

Q. And do you know why?

A. Yes.

Q. Do you understand that--well, why do you have to get them down there as soon as possible?

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A. Well, because the alcohol dissipates in the body after a certain period of time. And there are requirements--I believe, it is two hours, that once you submit to the breathalyzer or some form of blood alcohol test, within two hours of the observed--drive him--or accident etc.

Q. Did you place Mr. Welsh under arrest?

A. Yes, we informed him he was under arrest at that point.

Q. Was that inside his house or outside?

A. Inside his bedroom.

Q. Now, prior to placing him under arrest, what observations--you mentioned some. What did you arrest him for?

A. Driving while under the influence of an intoxicant.

13-40 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

CROSS EXAMINATION BY ATTORNEY SIMONSON

Q. Your police report indicates that at 8:49--this was almost ten minutes to nine you were dispatched to the area. How is that time fixed in your records? Why did you pick that time, instead of some other time?

A. When a call comes into the police dispatcher, at the

point the information is given to the calltaker, they put a card in a time punch machine and record the time that they are speaking to the complainant. And at that point the card is given to the person dispatching the call, and they tell the squad which is the location that they should respond. And they also assign a case number to the incident at that point.

13-41

Q. So, the 8:45 is when the call came in?

A. I believe it was 8:49.

Q. Excuse me, 8:49 is when the call came in.

A. Yes.

Q. So, it takes--within a minute you were dispatched. Where were you located at that time?

A. I really couldn't say. I mean I was somewhere in the area. That was my patrol beat. And I would think maybe somewhere within half a mile or so maybe.

Q. So it would take a few minutes to get there nonetheless.

A. Yes.

Q. Anywhere from three to five minutes I suspect.

A. I would think from the time I was dispatched, to the to the time I arrived, might be a minute to two at the

very most.

Q. You arrived at the scene and you had a conversation with Mr. Jablonic?

A. Yes.

Q. Mr. Jablonic, I think, could not tell you how many people were in the car, could he?

A. I believe he did.

Q. Well, he didn't tell you he saw a driver--this man drive the car. He told you that a guy came from that area with this description and talked to him, didn't he?

13-42 A. No.

Q. It was raining that evening?

A. I believe so.

Q. Kind of bad weather--visivility was poor, nonetheless.

A. I believe the rain may have either stopped or started to just lightly drizzle at that point.

Q. But you personally did not--did not know who was driving the car?

A. Do you mean did I see him drive the car?

Q. Yes.

A. No.

Q. So you are relying upon what Mr. Jablonic told you?

A. Yes.

Q. Or what he observed, rather.

A. Yes.

14-34 PARTIAL TRANSCRIPT OF THE COURT'S FINDING BY JUDGE FRANKEL

THE COURT: It is further corroborated, as Mr. Stewart indicated, by the fact that his clothes were still wet in his bedroom, and that there was apparently fresh muddy footprints leading up the stairs to the defendant's bedroom. The Court would find, without having to address the consent issue, that: 1) The police did have probable cause to believe that the defendant had committed the offense of operating while under the influence; and further find that due to the exigent circumstances of the need to take a breath sample from the defendant in conjunction

14-35 with their reasonable hot pursuit, that there was a valid reason for entry into the defendant's home without a warrant in order to apprehend the defendant. This contrasts rather strongly with the last case, which is the case--which is the case that held that the warrantless arrest in one's home is unconstitutional, in which case the police officers

arrived at the defendant's home some 13 days after the defendant's involvement in the criminal transaction. Here it would appear that the officers arrived within 10 minutes of the defendant's leaving the scene. And then given the need to avoid dissipation of alcohol within the body, the officer certainly had an exigency that would have made obtaining a warrant in this case unreasonable, in the Court's view. The defendant seems to argue both ways: 1) That the case was old and cold and that greater periods of time had elapsed on the one hand; and on the other hand, saying there is plenty of time left within the two-hour period in which to get a warrant. And the defendant really cannot argue it both ways. The Court would find both probable cause for arrest and a valid exception to the warrant requirement that would require the Court to deny the defendant's motion to dismiss the complaint for lack of probable cause.

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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

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Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal From An Order Entered July 14, 1980, by the Hon. Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12

Plaintiff-Respondent's Brief and Appendix

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Plaintiff-Respondent's Brief and Appendix

ISSUE FOR REVIEW

Did the Trial Court have jurisdiction to hold a reasonableness hearing on the defendant's refusal to take a breathalyzer test where the defendant was arrested without a warrant inside his home?

The Trial Court Answered: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not believe the issues raised in this appeal warrants either publication or oral argument.

STATEMENT OF THE CASE

The Plaintiff-Respondent agrees with the statement of the Defendant-Appellant.

FACTUAL STATEMENT

On April 24, 1978, at approximately 8:30 p.m., the defendant was seen operating his motor vehicle east on Mineral Point Road, a divided roadway, in the City of Madison, County of Dane, State of Wisconsin, by Randy Jablonic. Jablonic was directly behind defendant, and followed the defendant east on Mineral Point Road for approximately one mile. Jablonic observed that the defendant was operating his vehicle very erratic, he weaved across the center line of the roadway several times. Defendant then strayed completely over the center line, and began traveling east in the westbound lane. He continued to do this for a short distance, then suddenly veered to the left into a cemetery, after nearly causing a headon collision with a westbound vehicle traveling in the westbound lane. Jablonic immediately stopped his vehicle and observed defendant get out of his vehicle and stagger in the direction of Jablonic's vehicle. Defendant approached Jablonic vehicle and asked Jablonic for a ride home. Jablonic noticed that defendant's speech was very slurred and

his balance was poor. Jablonic refused to take the defendant home. Defendant in a slurred conversation said to Jablonic, "you wouldn't get your cops"? Defendant then staggered off, walking north toward Tree Lane. Approximately five minutes after defendant's departure, Madison Police Officer Daley arrived at the accident scene. He spoke with Jablonic who told him about his observations of the defendant, and said that he thought the defendant was possibly under the influence. Daley immediately proceeded to the defendant's residence, 7158 Tree Lane, which he was familiar with after having been there two weeks prior on an alcoholic-related disturbance involving the defendant. Daley arrived at the defendant's residence at approximately 9:00 p.m. and he was admitted into the house by the defendant's daughter and wife. They advised Daley that the defendant had just arrived and was upstairs. The defendant's wife directed Daley to the defendant and told Daley she was concerned about the defendant's alcoholic problem and said, "something has to be done." Daley then entered their bedroom where he found the defendant intoxicated. The defendant was arrested under Sec. 346.63(1) and subsequently requested to take a breath test under Sec. 343.305. Defendant refused.

I. ARGUMENT

The Appellant argues that his warrentless arrest was unconstitutional and unlawful because it was made inside his residence. Respondent disagrees. It is Respondent's

position that a lawful arrest can be made inside the reidence of the arrested person, without a warrant, so long as the arrest is based on probable cause and made under exigent circumstances. Laasch v. State, 84 Wis. 2d 587, 267 N.W. 278 (1977).

A. ARREST BASED ON PROBABLE CAUSE

Wisconsin Statute Section 968.07(1)(d) authorizes police officers to make arrests without arrest warrants. It provides that a law enforcement officer may arrest a person when there are reasonable grounds to believe that person is committing or has committed a crime. In the present case, the defendant was arrested by Officer Daley and charged with violating Section 346.63(1) of the Wisconsin Statutes, Operating A Motor Vehicle While Under the Influence of An Intoxicant or Controlled Substance. There are two elements to that crime.
1) The defendant must have been operating a motor vehicle on a highway in the State of Wisconsin; and
2) The defendant while operating his vehicle must have been under the influence of an intoxicant or controlled substance.

Therefore, the question before the trial court in the present case was whether or not Officer Daley had probable cause to believe that the defendant had violated Section 346.63(1) when he was arrested. The trial court held that he did. Respondent agrees. Probable cause was defined in Kluck v. State, 37 Wis. 2d 378, 155 N.W. 2d 26 (1967):

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing that an offense has been committed. It refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

In State v. Paszek, 50 Wis. 2d 619, 624-625, 184 N.W. 2d 836 (1971) the Court defined probable cause for an arrest as being:

> "probable cause to arrest refers to that quantum of evidence which would lead a police officer to believe that the defendant probably committed a crime. Henry v. U.S. (1959), 361 U.S. 98. It is not necessary that the evidence giving use to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility. Browne v. State, supra, and it is well established that the belief may be predicated in part upon hearsay information. Draper v. U.S., 358 U.S. 307 (1959). The quantum of evidence which constitutes probable cause to arrest must be measured by the facts of a particular case. Wong Sun v. U.S. (1963) 371 U.S. 471." (emphasis added)

The Respondent believes that the facts and information that Officer Daley possessed at the time he arrested the defendant were sufficient enough to warrant a prudent man in believing the defendant had probably been operating his automobile in violation of Section 346.63(1). Shortly before arresting defendant, Randy Jablonic gave Officer Daley the following information:

1) Defendant was operating his motor vehicle on a highway in the State of Wisconsin;

2) Defendant was operating his motor vehicle in a very erratic manner, and nearly caused a serious traffic accident;

3) Defendant left his motor vehicle in the cemetery;

4) Defendant staggered when he walked and was very unsteady;

5) Defendant's speech was very slurred;

6) Defendant had just left the area, heading in the direction of Tree Lane;

7) Defendant's physical description; and

8) His belief that defendant was possibly under the influence of an intoxicant or controlled substance.

There can be no question that Jablonic's information, if reliable, meets the probable cause standard set in Paszek, supra. The trial court viewed Jablonic's hearsay information as being credible, as the Court concluded that Jablonic was a citizen informant. In Paszek, information given to the police by a citizen informant, which demonstrated that the informant was in a position to see what he claims he saw, was enough to establish its reliability.

B. AN IN HOUSE ARREST IS PERMISSIBLE IF ENTRY WAS EITHER CONSENSUAL OR BASED ON EXIGENCY.

In the present case the trial court ruled that Officer Daley had probable cause to arrest the defendant for Operating A Motor Vehicle While Under the Influence Of An Intoxicant. The Court also held that the in house arrest of the defendant was permissible because it was based on "hot pursuit" and exigent circumstances. The trial court ruled that the facts in the present case fit the guidelines set for in house arrests spelled out in Lasch, supra.

> "The state identifies no exigent circumstances necessitating a warrantless entry, and the record is barren of any evidence of exigency. The arrest was not made in "hot pursuit"; there was no threat to the safety of other persons; there was no risk that evidence would be destroyed, since the delivered substance had been seized at the time of the previous arrest; and any suggestion that the police feared that the defendant would flee is dispelled by the fact that she had been released for approximately two weeks."

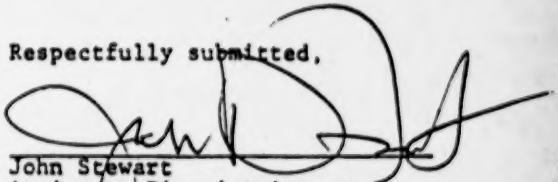
In the instant case, Officer Daley arrived at defendant's home within minutes of defendant. Although he was invited in by defendant's daughter and wife, the trial court held that Daley would have been justified to enter defendant's home without consent. The court recognized the necessity for Officer Daley to make a quick arrest of defendant so that defendant would be taken to the police station for the purpose of taking a breathalyzer test under Sec. 343.305. This would avoid the possible destruction of evidence of a crime as mentioned in Laasch. This rationale followed closely the holding in State v. Bentley, 92 Wis. 2d 860, 286 N.W. 153 (1979), where the court held that because blood rapidly metabolizes alcohol after a person ceases drinking, that fact creates an exigent situation so as to prevent the possible destruction of evidence.

CONCLUSION

For all the above-stated reasons, the Respondent submits that the Appellant has failed to show that the trial court

did not have personal jurisdiction to conduct his reasonableness hearing and therefore judgment of the trial court should be affirmed.

Respectfully submitted,



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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal from an Order entered July 14, 1980, by the Honorable Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. THE RESPONDENT UNFAIRLY DISTORTS THE ISSUE WHEN HE ASSERTS THAT THE POLICE WERE GIVEN CONSENT TO ENTER THE APPELLANT'S HOME.

The respondent attempts to establish on Pages 3, 6 and 7 of his brief that the police were granted permission to enter the appellant's home by his wife and daughter. This assertion unfairly misconstrues the issue while allowing the respondent's argument to appear more tenable. The

Trial Court, however, explicitly did not address the issue of consent in reaching its decision to suspend the appellant's operating privileges for 60 days because it was not in issue nor litigated. The Appellate Court is therefore precluded from considering this issue. (R. 14-34, A. App. 115.

The only dispositive issue here is whether exigent circumstances justified the warrantless arrest of appellant by the police inside the privacy of his home. If such circumstances did not exist, the appellant's arrest was unlawful and the Trial Court did not have jurisdiction to hold a reasonableness hearing.

II. THE APPELLANT'S IN HOUSE WARRANTLESS ARREST WAS UNLAWFUL ABSENT EXIGENT CIRCUMSTANCES.

The level of generality respondent uses to address the issue of exigent circumstances seriously flaws his argument. Admittedly, the police had probable cause based on the information and belief of Jablonic to investigate whether the appellant had been operating a motor vehicle while intoxicated. There was not at that time, however, any exigent circumstance to justify a warrantless police entry into appellant's home to determine whether he had committed such an offense.

The respondent's argument to the contrary on this issue is constitutionally unsound. This is nowhere more apparent than in respondent's brief recitation of the hold in State v. Bentley, 92 Wis. 2d 860, 286 N.W. 2d 153 (1973). Even on a high level of generality there is utterly no similarity between the exigent circumstance in Bentley, a five count felony case, and

the assertgd exigent circumstances in this case which is a minor misdemeanor charge. The constitutional underpinning of this case require a more precise analysis of the issue.

An exigent circumstance claim must be sufficient enough to outweigh and except the individual's Fourth Amendment right to be secure in the privacy of his home. Indeed, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 1380 (1980).

The asserted exigency in this case by the respondent and the Trial Court does not pass this constitutional test. The causal connection between the State's right to investigate the alleged offense and the assertion that a Bentley type exigency allowed the police to lawfully arrest the appellant without a warrant inside his home is constitutionally absurd. The connection and resultant analysis are simply too tenuous. In short, the respondent would have this Court rule that the police may warrantlessly enter an individual's home to investigate whether he had been operating a motor vehicle intoxicated, and upon discovery of that fact, arrest him on the exigent grounds that his intoxication may soon wear off.

III. IT IS UNSOUND POLICY TO ALLOW WARRANTLESS MISDEMEANOR ARRESTS OF DRIVERS WHO THE POLICE DID NOT OBSERVE OPERATING A MOTOR VEHICLE WHILE INTOXICATED.

Even if substantial constitutional considerations were not present in this case, it would be unsound policy for the Court to allow warrantless misdemeanor arrests of individuals who the police did not observe operating

a motor vehicle while intoxicated. The connection between an intoxicated individual and the unestablished fact that he had operated a motor vehicle is again quite tenuous. The Supreme Court of our neighbor state of Minnesota has held that the warrantless arrest of an individual for misdemeanor operation of a motor vehicle while intoxicated is unlawful "under circumstances where the offense was not committed in the presence of a police officer." State v. Cormican, 292 Minn. 505, 506, 195 N.W. 2d 586 (1972). We respectfully submit that that is a good law which should be adopted by the State of Wisconsin.

CONCLUSION

The Court, for reasons advanced in this brief and in the appellant's original brief, should reverse the order of the Trial Court suspending appellant's operating privileges and order the defendant-appellant's driving privileges be reinstated.

Respectfully submitted,

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